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THE
LAW REPORTS.

CASES

DETERMINED BY THE

Court for Crown Cases Reserved.

REPORTED BY

HON. E. CHANDOS LEIGH, L. W. CAVE, E. A. C. SCHALCH,

AND

ARTHUR WILSON, BARRISTERS-AT-LAW.

EDITED BY

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TABLE OF CASES REPORTED

IN THIS VOLUME.

A.		E.	
	PAGE		PAGE
Reg. v. Allen	367	Reg. v. Elworthy	103
— v. Anderson	161		
— v. Ardley	301		F.
		Reg. v. Falkingham	222
		— v. Firth	172
		— v. Fisher	7
		— v. Fletcher	39
		— v. ———	320
		— v. French	217
			G.
		Reg. v. Glyde	139
		— v. Greenland	65
		— v. Gregory	77
		— v. Guthrie	241
			H.
		Reg. v. Hadfield	253
		— v. Hapgood	221
		— v. Hardy	278
		— v. Harris	282
		— v. Harvey	284
		— v. Hibbert	184
		— v. Hodgkiss	212
		— v. Holmes	334
			I.
		Reg. v. Inhabitants of Chart and Longbridge	237
B.			
Reg. v. Bailey	347		
— v. Balls	328		
— v. Barnes	45		
— v. Barrow	156		
— v. Beale	10		
— v. Bowers	41		
— v. Brackenridge	183		
— v. Brown	244		
— v. ———	70		
— v. Bullock	115		
— v. Buttle	248		
C.			
Reg. v. Carpenter	29		
— v. Chambers	341		
— v. Child	307		
— v. Clark	54		
— v. Cooke	295		
— v. Curgerwen	1		
D.			
Reg. v. Davis	272		
— v. Dunning	290		

J.		R.	
	PAGE		PAGE
Reg. v. Jarvis	96	Reg. v. Rea	365
— v. Jenkins	187	— v. Beardon and Bloor	31
		— v. Redman	12
		— v. Reeve	362
		— v. Rice	21
		— v. Ritson	200
		— v. Robinson	80
		— v. Rogers	136
		— v. Ryland	99
K.		S.	
Reg. v. Kay	257	Reg. v. Saunders	75
— v. Keena	113	— v. Schmidt	15
— v. Kilham	261	— v. Sven Seberg	264
		— v. Shaw	145
		— v. Shepherd	118
		— v. Sherlock	20
		— v. Shickle	158
		— v. Smith	110
		— v. —	266
		— v. Stainer	230
		— v. Summers	182
L.		T.	
Reg. v. Lowrie	61	Reg. v. Taylor	194
— v. Lumley	196	— v. Thompson	377
		— v. Tomlinson	49
		— v. Townley	315
		— v. Tyree	177
		— v. Tyson	107
M.		W.	
Reg. v. Manning	388	Reg. v. Willis	363
— v. Marsden	131	— v. Warburton	274
— v. Martin	56, 214	— v. Ward	356
— v. —	378	— v. Western	122
— v. McGrath	205	— v. White	311
— v. McKale	125	— v. Whitehead	33
— v. Morriss	90		
N.			
Reg. v. Naylor	4		
— v. Newbould	344		
P.			
Reg. v. Parker	225		
— v. Parsons	24		
— v. Payne	27		
— v. —	349		
— v. Prince	150		
— v. Proud	71		

TABLE OF CASES CITED.

A.

	PAGE
Aickle's Case	1 Leach, 294, 297, 298, n. (a); See also p. 300, n. (a) . . . 104, 105
Allen v. The Sea, &c., Assurance Company	9 C. B. 574 261

B.

Baker v. Locke	34 L. J. (C.P.) 49 30
Barrack v. McCulloch	3 K. & J. 110 271
Barrow v. Barrow	4 K. & J. at p. 419 83
Bates, Ex parte	2 M. D. & De G. 337 83
Bell's Case	Foster's C. L. 430 288
Blade v. Higga	11 H. L. C. 621 316, 317, 319
Bryan's Case	2 F. & F. 567 59, 60
Burt v. Burt	2 Sw. & Tr. 88 368, 371, 372, 376

C.

Chambers v. Miller	32 L. J. (C.P.) 30 152
Colling v. Treweek	6 B. & C. 394, 398, 399; 1 Tayl. Ev. 4th ed. s. 422, p. 432 105
Cutten, Ex parte	1 Gl. & J. 317. 83

D.

Davenport v. Nelson	4 Camp. 26 82
Douglass's Case	1 Camp. 212 59

E.

Elsworth's Case	2 East, p. C. 986 288
---------------------------	---------------------------------

F.

Farrer v. Close	Law Rep. 4 Q. B. 602 232
Fletcher v. Calthorpe	6 Q. B. 880 124
Freegard v. Barnes	7 Ex. 827 76

G.

		PAGE
Gardner's Case	Dears. & Bell. C. C. 40	59, 60, 61
Genesee Chief v. Fitzhugh	12 Howard, 443	165
Goldie v. Gunston	4 Camp. 381	83
Graves v. Short	Cro. Eliz. 616	381, 382
Gray v. Reg.	11 Cl. & F. 427	380
Grevil's Case	1 And. 194	288

H.

Hawkesworth v. Showler	12 M. & W. 45, at p. 47	355
Hilton v. Eckersley	6 E. & B. 47, 53	232, 234
Hornby v. Close	Law Rep. 2 Q. B. 153	232, 234

J.

Jackson's Case	1 Moo. C. C. 119	128, 130
Jacobs v. Layborn	11 M. & W. 685	37, 38
Jennings's Case	2 Lew. C. C. 130	117

K.

Kitchen v. Shaw	6 Ad. & E. 629	28
---------------------------	----------------	----

L.

Lapsley v. Grierson	1 H. L. C. 498	197
Lavey v. The Queen	17 Q. B. 496	292, 294
Leary v. Lloyd	3 E. & E. 178	265, n. (2)
Lee v. Risdon	7 Taunt. 188, 189, at p. 191	316, 318
Lembro v. Hamper	Cro. Eliz. 147	286
Lewis's Case	Foster's Crown Cases, 116	204
Lonsdale (Lord) v. Rigg	1 H. & N. 923	317

M.

Mawson v. Hartsink	4 Esp. 102	71
McPherson v. Daniels	10 B. & C. at p. 272	360
Morrison's Case	Bell, C. C. 158	260

N.

Nash v. Reg.	4 B. & S. 935, 944	242
Needham v. Smith	2 Vern. 464	38
Nepean v. Doe d. Knight	2 M. & W. 894, 914; 2 Sm. L. C. 6th ed. 510	197, 198
Nicholson's Case	2 Leach, 610; 2 East, P. C. c. 16, s. 103, p. 669	127
Norcutt v. Dodd	Cr. & Phill. 100	271

O.

Oliver's Case	4 Taunt. at p. 274; 2 Leach, 1072	128, 129
-------------------------	--------------------------------------	----------

P.

	PAGE
Phillips v. Kingfield	1 Applet. 375 71
Points v. Attwood	6 C. B. 38, 49 30
Poole v. Canning	Law Rep. 2 C. P. 241 83
Powell v. Hoyland	6 Ex. 67, at p. 70 298
Price v. Green	16 M. & W. 346 233

R.

Reg. v. Abbot	1 Den. C. C. 273 61, 303
— v. Adams	1 Den. C. C. 38 152, 153
— v. Allen	1 Mood. C. C. 494 164, 168, 169
— v. —	Law Rep. 1 C. C. 367 366
— v. Allison	R. & R. C. C. 109 368
— v. Arnall	8 Cox, Cr. C. 439 335
— v. Atkinson	2 East, P. C. 673 152, 153
— v. Baldry	2 Den. C. C. 430 97, 98
— v. Bankes	8 C. & P. 574 242
— v. Bannen	2 Moo. C. C. 309 287, 288
— v. Barnes	2 Den. C. C. 59 153
— v. Bartlett	1 Cox, Cr. C. 105 353, 377
— v. Batty	2 Moo. C. C. 257 44, 45
— v. Berry	Bell, C. C. 46 323, 324, 327
— v. Bleasdale	2 C. & K. 765 174, 175
— v. Boulton	1 Den. C. C. 508 262, 263
— v. Bradford	Bell, C. C. 268 224
— v. Brawn	1 C. & K. 144 368, 369, 373
— v. Brecon	15 Q. B. 813 239
— v. Briggs	Dears. & Bell, C. C. 98 1
— v. Brooks	1 Cox, Cr. C. 6 191
— v. Bryan	Dears. & B. C. C. 265 302, 303, 304, 305, 306
— v. Burgon	Dears. & B. C. C. 11 61
— v. Camplin	1 Den. C. C. 89 157
— v. Chandler	Dears. C. C. 453 101, 102
— v. Chapman	1 Den. C. C. 432 213
— v. Child	Law Rep. 1 C. C. 307 360
— v. Christopher	Bell, C. C. 27 144
— v. Clay	5 Cox, Cr. C. 146 335
— v. Cockburn	3 Cox, Cr. C. 543 11, 242
— v. Cockroft	11 Cox, Cr. C. 410 335, 336, 337
— v. Cook	22 L. T. (N.S.) 216 246
— v. Cory	10 Cox, Cr. C. 23 158, 159
— v. Cryer	Dears. & B. C. C. 324 137
— v. Curgerwen	Law Rep. 1 C. C. 1 197
— v. Dalmas	1 Cox, Cr. C. 95 189
— v. Deeley	11 Cox, Cr. C. 607 350, 353, 377
— v. De Mattos	7 C. & P. 458 163
— v. Depardo	1 Taunt. 26 163
— v. Dodd	18 L. T. (N.S.) 89 234
— v. Dolan	Dears. C. C. 436 17, 18, 19
— v. Dring	Dears. & B. C. C. 329 32
— v. Dundas	6 Cox, Cr. C. 880 302
— v. Ellis	1 Frost & Fin. 309 3
— v. Elrington	1 B. & S. 688 90, 91
— v. Essex	Dears. & B. C. C. 371 153
— v. Evans	Leigh & Cave, 252 276
— v. Eyre	2 F. & F. 579 335

	PAGE
Reg. v. Fanning	{ 17 Ir. C. L. 289; 10 Cox, Cr. C. 411 . . . 367, 368, 369, 370, 371, 372, 374, 376
— v. Fellowes	1 C. & K. 115 . . . 292
— v. Fletcher	Bell, C. C. 63 . . . 40
— v. ———	8 Cox, Cr. C. 131 . . . 157
— v. France	2 M. & R. 207 . . . 227
— v. Gardener	1 Moo. C. C. 390 . . . 132
— v. Garner	2 Car. & K. 920 . . . 38
— v. ———	1 Den. C. C. 329 . . . 97, 98
— v. Gibbon	{ Leigh & Cave, C. C. 109; Hawk. P. C. Bk. 1, c. 27, s. 8 . . . 109
— v. Goode	Car. & M. 582 . . . 300
— v. Goodwin	10 Cox, Cr. C. 534 . . . 214, 216
— v. Goss	Bell C. C. 208 . . . 303
— v. Gray	{ Dears. & Bell, C. C. 308; Leigh & Cave, C. C. 365 . . . 9, 78, 287
— v. Green	3 F. & F. 274 . . . 184, 185
— v. Hadfield	Law Rep. 1 C. C. 253 . . . 280, 281
— v. Hannon	9 C. & P. 11 . . . 134
— v. Harding	8 Cox, Cr. C. 99 . . . 292
— v. Hassall	Leigh & Cave, C. C. 58 . . . 299
— v. Head	1 F. & F. 350 . . . 160
— v. Heaton	3 Frost & Fin. 819 . . . 3, 4, 197
— v. Hill	2 Den. C. C. 254 . . . 37
— v. Hodges	M. & M. 341 . . . 120
— v. Hogan	2 Den. C. C. 277 . . . 102
— v. Holloway	1 Den. C. C. at p. 375 . . . 209
— v. Hughes	2 C. & P. 420 . . . 117
— v. Hunt	8 C. & P. 642 . . . 232
— v. Illidge	1 Den. C. C. 404 . . . 260
— v. Ingram	1 Salk. 384 . . . 195, 242, 243
— v. Jackson	1 Mood. C. C. 119 . . . 152, 153, 154, 155
— v. ———	6 Cox, Cr. C. 525 . . . 353
— v. Jarvis	Law Rep. 1 C. C. R. 96 . . . 362
— v. Jeans	1 C. & K. 539 . . . 116
— v. Jemot	{ Old Bailey, 28th Feb. 1812; MS. cited, 1 Russ. on Crimes, 4th ed., p. 153, and Archbald's Crim. Plg. 16th ed. p. 395 164, 168, 169
— v. Jessop	Dears & B. C. C. 442 . . . 303
— v. Johnson	Leigh & Cave, C. C. 632 . . . 11
— v. ———	2 C. & K. 354 . . . 227
— v. Jones	1 C. & K. 243 . . . 227
— v. Keith	Dears. C. C. 486 . . . 134
— v. Kenrick	5 Q. B. 49 . . . 503
— v. Kirkwood	1 Moo. C. C. 311 . . . 134
— v. Lambert	2 Cox Cr. C. 309 . . . 232
— v. Lee	4 F. & F. at p. 65 . . . 227, 228
— v. Leonard	1 Den. C. C. 304 . . . 298
— v. Levi	Leigh & Cave, C. C. 597 . . . 84, 86, 87, 89
— v. Lewis	D. & B. C. C. 182 . . . 163
— v. Lightfoot	6 E. & B. 822 . . . 325
— v. Lyons	Car. & M. 217 . . . 17
— v. Mabbett	5 Cox, Cr. Cas. 339 . . . 102
— v. May	Leigh & Cave, C. C. 13, 17 . . . 44
— v. Megson	9 Car. & P. 418 . . . 190

	PAGE
Reg. v. Mehegan	7 Cox, Cr. Cas. 145 . . . 11
— v. Mellor	Deara & B. C. C. 468 . . . 381
— v. Merionethshire	6 Q. B. 343 . . . 239
— v. Messingham	1 Moo. C. C. 257 . . . 32
— v. Millard	1 Dears. & B. C. C. 166 . . . 323
— v. Millen	3 Cox's Cr. Cas. 507 . . . 97
— v. Miller	2 Moo. C. C. 249 . . . 233
— v. Millis	10 Cl. & F. at p. 689 . . . 368, 371
— v. Moore	Leigh & Cave, C. C. 1 . . . 143
— v. ———	1 Cox, Cr. C. 59 . . . 353, 377
— v. Morgan	Dears. C. C. 395 . . . 208
— v. Morrison	Bell, C. C. 158 . . . 262
— v. Murphy	4 Cox, C. C. 101 178, 179, 180, 181
— v. ———	Law Rep. 2 P. C. 535 . . . 381
— v. Newall	6 Cox, Cr. Cas. 21 . . . 112
— v. Nixon	{ Cited in Reg. v. Clarke, 4 F. & F. 1040, n. 246
— v. Noon	6 Cox, Cr. C. 137 . . . 360
— v. Oliver	Bell, C. C. 287 . . . 195, 242, 243
— v. Orchard	3 Cox, Cr. C. 248 . . . 288
— v. Osborne	8 Car. & P. 113 . . . 227
— v. Overton	4 Q. B. 83 . . . 292
— v. Owens	1 Moo. C. C. 205 . . . 117
— v. Parker	Leigh & Cave, C. C. 42 . . . 97
— v. Parks	2 East, P. C. 671 . . . 152
— v. Parry	Not reported . . . 353
— v. Payne	Law Rep. 1 C. C. R. 349 . . . 377, 378
— v. Pearce	3 B. & S. 531 . . . 323
— v. Peel	2 F. & F. 21, 22 . . . 189, 192
— v. Pelham	8 Q. B. 959 . . . 102
— v. Penson	5 C. & P. 412 . . . 370
— v. Philpotts	1 C. & K. 112 . . . 292
— v. Preston	2 Den. C. C. 353 . . . 143
— v. Prince	Law Rep. 1 C. C. 150, 154 . . . 298
— v. Proud	Leigh & Cave, 97 . . . 180, 181, 332
— v. Pulbrook	9 C. & P. 37 . . . 260
— v. Raake	2 Mood. C. C. 66 . . . 260
— v. Read	1 Den. C. C. 377 . . . 11
— v. Redford	21 L. T. (N.S.) 508 . . . 233
— v. Richards	4 F. & F. 860 . . . 227, 228
— v. Richardson	2 F. & F. 343 . . . 322
— v. Ridgway	3 F. & F. 838 . . . 303
— v. Robins	2 Moo. & R. 512 . . . 335, 337
— v. Robinson	Bell, C. C. 34 . . . 59
— v. Rodway	9 Car. & P. 784 . . . 128, 129
— v. Roebuck	Dears. & B. C. C. 24 . . . 303
— v. Rowton	Leigh & Cave, C. C. 520 . . . 71
— v. Salvi	{ Central Crim. Court, Sess. Pap. vol. 46, p. 884 . . . 93, 94
— v. Saunders	8 C. & P. 265 . . . 157
— v. Scott	Dears. & B. C. C. 47 82, 85, 87, 90, 250
— v. Shaw	Leigh & Cave, C. C. 579 . . . 323
— v. Shepherd	7 C. & P. 579 . . . 97, 98
— v. ———	Law Rep. 1 C. C. R. 118 . . . 174, 175
— v. Silvester	33 L. J. (M.C.) 79 . . . 28
— v. Simmons	Bell C. C. 168 . . . 323
— v. Skeen	Bell, C. C. 97, 127 . . . 82, 85
— v. Sleeman	Dears. C. C. 249 . . . 97

	PAGE
Reg. v. Sleep	9 Cox, Cr. C. 559 246
— v. —	Leigh & Cave, C. C. 44, 54 287
— v. Small	8 C. & P. 46 154
— v. Smith	Law Rep. 1 C. C. p. 110 323
— v. —	1 Moo. C. C. 289 377
— v. Sparrow	Bell, Cr. C. 298 360
— v. Stanton	5 Cox, Cr. C. 324 91
— v. Stevens	1 Cox, Cr. C. 83 303
— v. Stewars	1 Cox, Cr. C. 174 154
— v. Stewart	1 Cox, Cr. C. 174 355
— v. Stratton	1 Camp. 549, n. 234
— v. Summers	Law Rep. 1 C. C. 182 364
— v. Taylor	Law Rep. 1 C. C. 194 242, 243
— v. Thompson	Leigh & Cave, C. C. 233 298, 299, 300
— v. Thurborn	1 Den. C. C. 387 139, 143, 144
— v. Tite	Leigh & Cave, C. C. 29, 33 44
— v. Tongue	Bell, C. C. 289 233
— v. Vann	2 Den. C. C. 325 102
— v. Wade	Not reported 216
— v. —	1 Moo. C. C. 86 35
— v. Walker	Dears. C. C. 358 132
— v. —	{ Dears. & B. C. C. 600; 2 Mood. & Rob. 446 43, 45, 91
— v. Warringham	{ 15 Jur. 318; 2 Den. C. C. 447, note 97, 98
— v. Watts	7 Ad. & E. 461, 469 30
— v. —	2 Den. C. C. 14 300
— v. Whiteman	Dears. C. C. 353 120
— v. Whybrow	8 Cox, Cr. C. 438 112
— v. Wilkins	1 Leach, 520; 2 East, P. C. 673 154
— v. Williams	{ 2 Den. C. C. 433; 3 Russ. on Crimes, 4th ed. 377 97, 98
— v. —	6 C. & P. 626 331
— v. —	6 C. & P. 390 128, 129
— v. Wilson	8 C. & P. 111 207
— v. Woolley	1 Den. C. C. 559 303
— v. Yeadon	Leigh & Cave, C. C. 81 195, 242, 380
— v. Young	3 C. & K. 106 227, 228
Rex v. Barker	3 C. & P. 589 335, 337
— v. Callanan	6 B. & C. 102 292, 293
— v. Clarke	2 Stark. N. P. C. 241 335, 337
— v. Crockett	4 C. & P. 544, 545 189
— v. Cross	1 Id. Raym. 711 79
— v. Crossley	2 Moo. & Rob. 17, 19 262
— v. Davis	1 Leach, C. C. 493 286
— v. Dawson	3 Stark. 62 242
— v. Day	Sayer, 202 380
— v. Dowlin	5 T. R. 311 292, 293
— v. Foster	Russ & Ry. 459 213
— v. Hall	1 Moody, 474 180
— v. Handy	6 T. R. 286 268
— v. Harborne	2 A. & E. 540 197, 198
— v. Hatchley Fradgelly	1 Sess. Ca. 180 380
— v. Hayward	6 C. & P. 157, 160 189, 192
— v. Higgins	2 East, 5 78
— v. Hodgson	R. & R. 211 335, 336, 337, 338
— v. Jackson	Russ. & Ry. 487 157
— v. Jensen	1 Moody, 434 180

	PAGE
Rex <i>v.</i> Longstreeth	1 Moo. C. C. 137 . . . 153, 155
— <i>v.</i> Nicholas	6 Cox, Cr. C. 120 . . . 190
— <i>v.</i> Martin	6 C. & P. 562 . . . 335, 337
— <i>v.</i> Parkes	2 Leach, at p. 785 . . . 202
— <i>v.</i> Ryan	2 Moo. C. C. 15 . . . 287
— <i>v.</i> Smith	1 Moo. C. C. 289 . . . 353
— <i>v.</i> Spilsbury	7 C. & P. 187, 190 . . . 190
— <i>v.</i> Turner	1 Moo. C. C. 239 . . . 287
— <i>v.</i> Twyning	2 B. & Ad. 386 . . . 197, 198
— <i>v.</i> Van Butchell	3 C. & P. 629, 631 . . . 189
— <i>v.</i> Williams	8 C. & P. 286 . . . 157
— <i>v.</i> Withall	1 East, P. C. 517 . . . 242
— <i>v.</i> Wood	2 Leach, 721 . . . 207
— <i>v.</i> Wroxtton	4 B. & Ad. 640 . . . 365
Rickman's Case	2 East, P. C. 1034 . . . 346

S.

Salway <i>v.</i> Wale	Moore, 655 . . . 202
Sandiman <i>v.</i> Breach	7 B. & C. at p. 100 . . . 28
Sattler's Case	D. & B. C. C. 525 . . . 162
Sedley's, Sir Charles, Case	1 Sid. 163 . . . 283
Sharp <i>v.</i> Taylor	2 Phill. 801 . . . 233
Sims <i>v.</i> Thomas	12 A. & E. 536 . . . 270
Stedman's Case	Cro. Eliz. 137 . . . 292
Steel <i>v.</i> Smith	1 B. & A. 94, 99 . . . 286

T.

Tenant <i>v.</i> Elliott	1 B. & P. 3 . . . 233
Thomas <i>v.</i> Lane	2 Sumner, 1 . . . 164, 168, 170
Tongue <i>v.</i> Tongue	1 Moo. P. C. 90 . . . 365, 366

U.

United States Bank <i>v.</i> Bank of Georgia	10 Wheaton, 333 . . . 152
United States <i>v.</i> Coombs	12 Peters, 72 . . . 164, 168, 170
— <i>v.</i> Hamilton	1 Mason, 152 . . . 165
— <i>v.</i> Holmes	5 Wheat. 412 . . . 164
— <i>v.</i> Wiltberger	5 Wheat. 76 . . . 164, 168, 169, 170

V.

Vicary <i>v.</i> Farthing	Cro. Eliz. 411 . . . 381
Vaughan <i>v.</i> Vanderstegen	2 Drew. 408 . . . 83
— <i>v.</i> Worrall	2 Sw. 400 . . . 38

W.

Watson <i>v.</i> Wace	5 B. & C. 153 . . . 83
Wavell's Case	1 Moo. C. C. 224 . . . 59
West, Ex parte	22 L. J. (Bank) 71 . . . 84
White <i>v.</i> Garden	10 C. B. 919, at p. 927 . . . 298
Winsor <i>v.</i> Reg.	6 B. & S. 143; 7 B. & S. 490 . . . 350, 354
Witchell's Case	2 East, P. C. 830 . . . 298
Witham <i>v.</i> Lewis	1 Wils. 48 . . . 380
Woodcock's Case	1 Leach, C. C. 500, 502 . . . 189, 192
Worrall <i>v.</i> Jones	7 Bing. 395 . . . 351

Y.

Yardley <i>v.</i> Arnold	10 M. & W. 141, 145 . . . 38
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CASES

DETERMINED BY THE

COURT FOR CROWN CASES RESERVED

IN

MICHAELMAS TERM, XXIX VICTORIA.

THE QUEEN v. JOHN CURGERWEN.

Bigamy—Absence during seven years.

1865
Nov. 11.

Upon a trial for bigamy, when it is proved that the prisoner and his first wife have lived apart for the seven years preceding the second marriage, it is incumbent on the prosecution to shew that during that time he was aware of her existence; and, in the absence of such proof, the prisoner is entitled to be acquitted.

THE following case was stated by Willes, J.:—

The accused was tried before me at the last Cornwall Assizes for bigamy, when the question arose whether, when a husband and wife have lived apart for seven years, and he marries again, there being no evidence to shew his knowledge of the existence of his first wife (so to speak), he is liable to be convicted of bigamy, unless he can prove that, at the time of the second marriage, he did not know of his first wife being alive; in other words, whether the burden of proof of absence of such knowledge rests upon the prisoner, a question left undecided in *Reg. v. Briggs*. (1)

The prisoner was a man-of-war's man. The first marriage was to one Charlotte Curgerwen on the 1st day of September, 1852, at Buryan, in Cornwall. After the marriage the couple went to Ireland, where the prisoner was then in the Coast Guard service; and they lived together until June, 1853, when, in consequence of some disagreement, she left him, and returned to her father's house

(1) Dears & Bell, C. C. 98; 26 L. J. (M. C.) 7.

1865
THE QUEEN
v.
CURRIEWEEN.

at Buryan. In January, 1854, the prisoner went to Portsmouth to join a ship of war which was proceeding to the Baltic, and was afterwards engaged in the Russian war. Upon that occasion the first wife went to Portsmouth to see the prisoner off; and, after doing so, she, in or about March, 1854, returned to her father's house, where she remained without seeing or corresponding with her husband, or, so far as the evidence went, knowing whether he was dead or alive until shortly before the prosecution. There was no evidence that he had in the mean time ever been near where she lived, or had seen or heard of her or any member of her family, or known whether she was dead or alive. After the war, but at what precise time did not appear, the prisoner returned to England, and was again employed in the Coast Guard. On the 9th of July, 1862, the prisoner, being then at a Coast Guard station at a small place upon the coast of Devon, contracted the second marriage with one Eliza Hardy; and they lived together as man and wife undisturbed until this prosecution. A short time before the prosecution he was promoted, and sent to a station in Cornwall, about twenty miles from where his first wife was living. This led to the proceedings. It appears, therefore, that the prisoner and his first wife had been living apart for more than eight years at the time of the second marriage, and under circumstances in which it was at the least equally probable that he did not know, as that he did know, of his first wife being alive, if not, indeed, as I inclined to think, more probable that he did not know. A statement of the prisoner before the magistrates was put in; but, fairly construed, it amounted only to an admission of having been married twice, and of his then—that is, when before the magistrates—knowing that his first wife was alive.

Prideaux, for the prisoner, contended that there was no evidence upon which a conviction could properly take place, and that the burden of proving absence of knowledge was not upon the prisoner.

Knowing that the question of burden of proof in these cases was unsettled, I determined, in the event of a conviction, to reserve these objections; and I directed the jury, in substance, that the fact of the second marriage whilst the first wife was alive made a *primâ facie* case, and that the burden was upon the prisoner to

bring himself within the exception in the statute; and, it being clear that the living apart for seven years was proved, they ought to acquit him if they were satisfied that he did not know of his wife being alive within the seven years, and convict if the evidence did not so satisfy them.

1865
THE QUEEN
v.
CUBBERWEN.

The jury found the prisoner *Guilty*; and I let him out on bail, until the opinion of the Court for Crown Cases Reserved was taken upon the propriety of the conviction.

This case was considered on the 11th of November, 1865, by POLLOCK, C.B., WILLES, J., PIGOTT, B., and SHEE and MONTAGUE SMITH, JJ.

No counsel was instructed to argue on either side; but

Prideaux, amicus curiæ, referred the Court to *Reg. v. Heaton*, (1) where it was held by Wightman, J., that the burden of proof that a prisoner charged with bigamy has not been continually absent from his wife for seven years, and that she was known by him to be living within that time, is on the prosecution, on the ground that the prisoner cannot prove the negative. He also called the attention of the Court to *Reg. v. Ellis*, (2) in which Willes, J., said that, where the husband had been living apart from his wife for seven years, under such circumstances as to raise a probability that he supposed that she was dead when he re-married, it might be necessary on the part of the prosecution to offer evidence to shew that he knew that his first wife was alive.

POLLOCK, C.B. This question has arisen more than once before; and we are now asked to settle the law on the subject. The term "burden of proof" is an inconvenient one, except when a person is called upon to prove an affirmative. Our attention has been called to a note by the editor of *Russell on Crimes*, (3) known as a gentleman of great learning, ability, and research, who appears to have adopted the view that the burden of proof lies on the prisoner. We think, however, that it is contrary to the general spirit of the English law that the prisoner should

(1) 3 Fost. & Fin. 819.

(2) 1 Fost. & Fin. 309.

(3) *Russell on Crimes and Misdemeanors*, 4th edition, by Greaves, vol. 1, p. 270, note (L)

1865
 THE QUEEN
 v.
 CURGERWEN.

be called on to prove a negative; and that it is better, and more in agreement with the general doctrine and principles of our criminal law, to adopt the rule laid down by Wightman, J., in *Reg. v. Heaton*. (1)

Conviction quashed.

Nov. 11.

THE QUEEN v. FRANCIS NAYLOR.

False Pretences—Intent.

The crime of obtaining goods by false pretences is complete, although, at the time when the prisoner made the pretence and obtained the goods, he intended to pay for them when it should be in his power to do so.

THE following case was stated by the Deputy-Recorder of the city of Chester:—

This prisoner was tried before me at the Quarter Sessions for the city of Chester, on the 14th of July, 1865. There were three counts in the indictment; but the only one which became material was the second, which stated that “the said Francis Naylor unlawfully, knowingly, and designedly did in a certain letter written by him, the said Francis Naylor, and sent by him to the said Mary Ingram, falsely pretend to the said Mary Ingram that the said Francis Naylor had seen a person named Moss (meaning one Elias Moss, of Roscoe Arcade, in the town of Liverpool, furniture-broker, the said Elias Moss then and long before being well known to the said Mary Ingram as a furniture-broker), and that the said Elias Moss was furnishing a house, and wanted two Kidderminster carpets, two felt carpets, and twelve yards of stair carpets, and that the said Elias Moss wanted the said carpets to come by passenger train, by means of which said false pretences contained in the said letter, the said Francis Naylor did then unlawfully obtain from the said Mary Ingram two Kidderminster carpets, two felt carpets, and twelve yards of stair carpet, with intent thereby then to defraud. Whereas, in truth and in fact, the said Francis Naylor had not then seen the said Elias Moss, nor did the said Elias Moss then want the said carpets or any carpets to come by passenger train, nor had the said Elias Moss then ordered the said carpets,

(1) 3 Fost. & Fin. 819.

or any carpets whatsoever, to the great damage and deception of the said Mary Ingram, to the evil example," &c.

1865

THE QUEEN
v.
NAYLOR.

The prosecutrix, Mary Ingram, at the time of the transaction in question, carried on the business of an upholsterer and furniture-dealer at Chester. For some considerable time prior to the month of January, 1865, the prisoner had been employed by the prosecutrix to procure orders for goods to be supplied by her; and, during the six months prior to the transaction in question, goods to a considerable amount had been supplied by the prosecutrix, in consequence of representations by the prisoner that he had received orders for them. In the month of January, 1865, the prisoner wrote a letter to the prosecutrix containing the statement set out in the second count, that is to say, that a person named Moss, a furniture-dealer at Liverpool, was in want of some carpets of sizes and descriptions mentioned in the letter, and that such carpets were to be sent by passenger train to Moss's place of business. In consequence of this letter the prosecutrix forwarded by railway a package containing carpets of the size and description mentioned in the letter, such package being directed to Moss at his place of business at Liverpool, where it arrived in due course. The value of the carpets so sent was 12*l*. Prior to the arrival of the package, the prisoner, who had been previously acquainted with Moss, and also with persons in his employment, applied to one of such persons, stating that he expected a package of carpets from Chester to be sent to Moss's, and requested that it might be permitted to remain there. Permission was given; and, after the arrival of the carpets at Moss's, the prisoner applied there for them, and they were delivered to him. The statement in the letter that Moss was in want of the carpets was false. Neither Moss nor any person in his employment had had any communication with the prisoner about carpets prior to his writing the letter containing such statement. The prosecutrix, in cross-examination, stated that payments on account had been made to her by the prisoner, both prior and subsequent to the transaction in question, and that such payments amounted to 465*l*.; but that the carpets in question had never been paid for. She further stated, on cross-examination, that, prior to the transaction in question, the prisoner had accepted bills of exchange for her accommodation. She also

1865
THE QUEEN
v.
NAYLOR.

stated that she expected to receive the price of the carpets from the prisoner, but that she supplied them in consequence of his representation that Moss wanted them, as she knew that Moss was a respectable and solvent person.

The jury found, in answer to questions put by me—that the prisoner's statement that Moss wanted the carpets was false to his knowledge; that he made it to induce the prosecutrix to part with the carpets; that the prosecutrix was induced to part with the carpets by reason of such false pretence; and that the prisoner, at the time he made the pretence and obtained the carpets, intended to pay the prosecutrix the price of them when it should be in his power to do so.

Upon this finding, the counsel for the prisoner contended that the jury had negatived the intention to defraud, and, consequently, that the prisoner was entitled to a verdict of *Not Guilty*. I entertained some doubt upon the question, and, therefore, reserved it for the consideration of the Court for Crown Cases Reserved. I directed a verdict of *Guilty* to be entered, but postponed judgment; and the prisoner was discharged upon recognizance of bail to appear and receive judgment.

The question for the consideration of the Court is, whether upon the facts above stated, and the finding of the jury, a verdict of *Guilty* or a verdict of *Not Guilty* ought to have been entered.

This case was considered on the 11th of November, 1865, by POLLOCK, C.B., WILLES, J., PIGOTT, B., and SHEE and MONTAGUE SMITH, JJ.

No counsel appeared on either side.

POLLOCK, C.B. We are all of opinion that this conviction must be affirmed.

Conviction affirmed.

THE QUEEN v. WILLIAM FISHER.

*Malicious Injury—Damaging Engines—24 & 25 Vict. c. 97, s. 15.*1865
Nov. 11.

The prisoner plugged up the feed-pipe of a steam-engine, and displaced other parts of the engine in such a way as rendered it temporarily useless, and would have caused an explosion, if the obstruction had not been discovered, and, with some labour, removed :—

Held, that he was guilty of damaging the engine with intent to render it useless, within the meaning of the 24 & 25 Vict. c. 97, s. 15.

THE following case was stated by the Chairman of Quarter Sessions for the county of Suffolk :—

At the General Quarter Sessions of the Peace for the county of Suffolk, held by adjournment at Bury Saint Edmunds on the 4th of July, 1865, William Fisher was arraigned upon an indictment framed on the 24 & 25 Vict. c. 97, s. 15, (1) which charged that he unlawfully, maliciously, and feloniously damaged, with intent to destroy or render useless, a certain thrashing machine, the property of Edward Kersey Green.

At the trial it was shewn that the engine in question had been under the prisoner's care as engine-driver and servant to the prosecutor, and that, on Saturday the 6th of May last, in consequence of a difference between him and the prosecutor, the prisoner left prosecutor's service. On Monday, the 8th of May, the prisoner did not come to work; but in the course of the day he told the prosecutor that he had not a man who could drive the engine, and that he would be glad to take him back. When the prosecutor and his other men went to work the engine, they got up the steam, and tried to start it, but found they could not get it to move. They then unscrewed the engine to ascertain the cause, when they discovered that the working parts of the engine had been so tightly screwed up that the steam-power of the engine was not sufficient to set them in motion; and it was proved that this must have been the result of design and not of accident.

(1) That section enacts that, "Whoever shall unlawfully and maliciously cut, break, or destroy, or damage with intent to destroy or to render useless, any machine or engine, whether fixed

or moveable, used or intended to be used for sowing, reaping, mowing, thrashing, ploughing, or draining, or for performing any other agricultural operation . . . shall be guilty of felony."

1865
THE QUEEN
v.
FISHER.

They also discovered that the plug of the pump which supplies the engine-boiler with cold water had been taken out and replaced with the wrong side up, so that no water could pass from the pump into the boiler; and this also, it was deposed, must have been done designedly, and could not have been accidental. They further found that the pipe leading from the plug of the pump to the boiler had been stopped up by a piece of stick being thrust up it, so that, even supposing that water could have passed through the plug, it could not have got through the pipe into the boiler. The engine was thus rendered temporarily useless; and it took the prosecutor and his men two hours to get it to work: and it was, moreover, shewn that, if the fire had been kept up, the plunger of the pump would have forced the pump off the boiler, and also that the water in the boiler would have become exhausted, and the boiler would have burst, and serious consequences would have ensued; but it was admitted by the prosecutor that, when the working parts of the engine had been loosened, the plug taken out and properly replaced, and the obstruction from the pipe had been removed, the engine was just as good as before. Various circumstances tended to shew that these acts had been done by the prisoner.

Upon these facts it was objected by the counsel for the prisoner that there had been no offence committed within the meaning of the statute, inasmuch as there had been no actual damage done to the engine.

The Court left the case to the jury, and directed them that the preventing the machine from working was "doing damage;" and the jury found the prisoner *Guilty*.

Upon the application of counsel for the prisoner, the Court decided to reserve the question of law for the consideration of the Court for Crown Cases Reserved, whether, upon the facts stated, the temporary injury to the engine was such a malicious damage as to bring the prisoner under the penalties of the statute, and whether the prisoner was properly convicted.

This case was argued on the 11th of November, 1865, before POLLOCK, C.B., WILLES, J., PIGOTT, B., and SHEE and MONTAGUE SMITH, JJ.

1865

THE QUEEN
v.
FISHER.

J. H. Mills for the prisoner:—In all the cases decided on this section of the statute a certain portion of the machinery has been removed, and some absolute damage has been done to prevent the machine from working. Here there was no taking away of any portion; no cutting; no breaking; no absolute damage.

[*PRIGOTT, B.* There was damage, because labour was required to re-instate the machine.]

That is not the sort of damage intended. In order to sustain an indictment under this section, there must be some lesion. In *Reg. v. Gray*, (1) it was held that, to amount to a bodily injury dangerous to life, there must be a lesion of the organs, and not merely a temporary functional derangement. Here there was no lesion of the machine, but only a temporary derangement of its functions.

[*WILLES, J.* There was a lesion in the sense of a dislocation. *SHEE, J.* In section 29 of the same act (2) the case is provided for, with reference to damaging steam-engines for working mines, by the words “stop, obstruct, or hinder the working of,” being inserted.]

That is in the prisoner's favour. He might have been convicted of the attempt; but he was not guilty of the full offence.

Orridge, for the Crown, was not called upon to argue.

POLLOCK, C.B. We are all of opinion that the conviction is good. It is like the case of spiking a gun, where there is no actual damage done to the gun, although it is rendered useless. The case falls within the expression “damage with intent to render useless.” Can it be said that the machine was not damaged, when it was placed in such a position that, if the water had gone on boiling, the boiler would have burst? Moreover, great injury may be done to a machine by the displacement of its parts; and in this case, until the parts were replaced, the machine was useless. Surely the displacement of the parts was a damage within the 15th section, if done with intent to render the machine useless.

Conviction affirmed.

(1) *Dears. & Bell*, C. C. 303; 26 L. J. (M. C.) 203.

(2) 24 & 25 Vict. c. 97.

1865
Nov. 11.

THE QUEEN v. FREDERICK BEALE.

Attempt to have carnal knowledge of a girl under the age of ten—Consent.

The offence of attempting to have carnal knowledge of a girl under the age of ten years may be committed, notwithstanding the girl consents to the acts done.

THE following case was stated by the Deputy Assistant Judge of Middlesex:—

Frederick Beale was indicted and tried before me at the Middlesex Sessions, on the 23rd of August, 1865, for unlawfully attempting to have carnal knowledge of Mary Jane Catherine Green, a child under the age of ten years. The indictment also contained a second count for assaulting the said Mary Jane Catherine Green, with intent to carnally know and abuse her, and a third count for an indecent assault.

Mary Jane Catherine Green proved that she was nearly ten years old; that she lived with her father and mother; and that the prisoner was a lodger in their house. On the day in question, she went into his room, when he pulled her between his knees, raised her clothes, took down his trowsers, and indecently assaulted her. He hurt her a little; on which she cried out, "Oh!" But she did nothing to prevent him, and made no objection to the act. He told her not to tell her mother; and she did not in fact tell of it until some days after, when a discharge was discovered, which the medical man proved to be gonorrhœa.

Upon this evidence, it was contended by the counsel for the prisoner, that, inasmuch as the child had consented to the act done to her, there was no assault in law—an assault implying an act done with more or less of force, used against the will of the party—and that therefore the prisoner must be acquitted upon the second and third counts, both of which charged assaults. It was also contended that, although it was made a statutable offence to have carnal knowledge of a child of that age, without regard to her consent or non-consent, yet, in this case the prisoner, being only indicted for the attempt, could not be convicted upon the first count, because the child could consent to the attempt, although not to the complete offence, and, in fact, did consent. He cited

the recent case of *Reg. v. Johnson*, (1) in support. He contended also that, upon the authority of *Reg. v. Read*, (2) *Reg. v. Cockburn*, (3) and *Reg. v. Mehegan*, (4) tender years did not affect the rule.

1865
THE QUEEN
v.
BEALE.

I directed the jury that, if they were satisfied that the girl actually consented to the act being done to her, they should acquit the prisoner; but that consent meant a willing mind on her part to allow the act to be done; and that, if from her tender years, not knowing what was being done, she merely submitted without the exercise of any will by her, it would be such an assault in law as would support the indictment.

The jury found the prisoner "*Guilty*, for that the child was too young to know what it was she was doing, and therefore consented to the act done by the prisoner."

On the application of the counsel for the prisoner, I reserved the point; and the questions for the Court are:—

Whether upon the facts proved and the finding of the jury that the child consented for the reason stated, the prisoner was rightly convicted of a misdemeanor in attempting to know and abuse a child under ten years of age, as charged in the first count of the indictment, notwithstanding the consent of the child; and also whether he was guilty of an indecent assault?

This case was argued on the 11th of November, 1865, before POLLOCK, C. B., WILLES, J., PIGOTT, B., and SHEE and MONTAGUE SMITH, JJ.

Prentice for the prisoner:—This case was reserved upon the authority of *Reg. v. Mehegan*, (4) where the prisoner was convicted of assaulting and attempting to have carnal knowledge of a girl between ten and twelve years of age; and the conviction was afterwards quashed, on the ground that the judge had refused to leave the question of consent to the jury.

[WILLES, J. Is there any contemporary Irish report of that case? I can hardly believe that it is correctly reported.(5)]

(1) Leigh and Cave, C. C. 632;
34 L. J. (M. C.) 192.

(2) 1 Den. C. C. 377; 18 L. J.
(M. C.) 88.

(3) 3 Cox Crim. Cas. 543.

(4) 7 Cox Crim. Cas. 145.

(5) It appears, from a note at the end of the case, that the reporter was not present in court during the argument.

1865

THE QUEEN
v.
BEALE.

At any rate, the judge in this case misdirected the jury, in telling them that any assault at all, whether committed with or without such modified consent as he speaks of, was material to the offence charged against the prisoner.

[POLLOCK, C.B. That point is quite beside the real question, which is whether the prisoner was committing the offence of attempting to have carnal knowledge of the girl. If he was, her consent was a matter of indifference.]

F. H. Lewis appeared in support of the conviction, but was not called upon to argue.

POLLOCK, C.B. The learned judge who tried the case seems to have thought that a full and ample consent on the part of the girl would have prevented the completion of the crime, and that a consent of a different character would not have had that effect. That opinion, in reality, was utterly unfounded. Consent was altogether unimportant. The jury said the prisoner was guilty, but found that there had been a qualified consent on the part of the girl; and, if the nature of the consent had been material, it might have been necessary to analyze the facts of the case. Those facts, however, shew an attempt to commit a crime, where consent was immaterial. Of course, if the indictment had been merely for an indecent assault, the question of consent would have become material.

Conviction affirmed.

Nov. 11.

THE QUEEN v. HENRY REDMAN.

Threat to accuse of an infamous crime—Intent—24 & 25 Vict. c. 96, s. 47.

The prisoner threatened *A.*'s father that he would accuse *A.* of having committed an abominable offence upon a mare, for the purpose of putting off the mare and forcing the father, under terror of the threatened charge, to buy and pay for her at the prisoner's price:—

Held, that the prisoner was guilty of threatening to accuse, with intent to extort money, within the meaning of the 24 & 25 Vict. c. 96, s. 47.

THE following case was stated by Willes, J.:—

Henry Redman was tried before me at the last Wilts Assizes,

under the 24 & 25 Vict. c. 96, s. 47, (1) for threatening a boy's father to accuse the boy of an abominable offence upon a mare, with intent to extort money from the father.

1865
THE QUEEN
v.
REDMAN.

The prisoner charged the boy with an abominable offence upon a mare in the prisoner's possession.

Before giving information against the boy (which he afterwards did, when the charge was dismissed as groundless), the prisoner went to the boy's father, and stated to him that the offence had been committed, and that, if the father did not buy the mare of him, and pay him 3*l.* 10*s.* for her, he would accuse the boy. The father refused, saying that the prisoner was a liar, and wanted to get rid of the mare. The prisoner pursued the same course to the boy's master, who treated his attempt in the same way. No evidence was given as to the value of the mare; but there was the above evidence of the prisoner's desire to get rid of her. The boy was called, and denied the charge, which was a most improbable one.

I told the jury to find the prisoner *Guilty*, if he threatened the father to make the charge for the purpose of putting off the mare and forcing the father, under terror of the threatened charge, to buy and pay for her at the prisoner's price.

The jury found the prisoner *Guilty*; and I directed that he should remain in custody, until the opinion of the Court for Crown Cases Reserved was obtained upon the question whether the case was within the statute.

This case was considered on the 11th of November, 1865, by POLLOCK, C.B., WILLES, J., PIGOTT, B., and SHEE and MONTAGUE SMITH, JJ.

No counsel appeared for the prisoner.

C. S. Bowen appeared for the Crown, but was not called upon to argue.

(1) That section enacts that "Who-soever shall accuse, or threaten to accuse, either the person to whom such accusation or threat shall be made, or any other person, of any of the infamous or other crimes lastly hereinbefore mentioned, with the view or intent in

any of the cases last aforesaid to extort or gain from such person so accused or threatened to be accused, or from any other person, any property, chattel, money, valuable security, or other valuable thing, shall be guilty of felony."

1865 POLLOCK, C.B. We are all of opinion that this conviction
THE QUEEN must be affirmed.

v.
REDMAN.

WILLES, J. The prisoner had no counsel; and I reserved the point, because it had not occurred before; not that I had any serious doubt about it.

Conviction affirmed.

END OF MICHAELMAS TERM.

CASES

DETERMINED BY THE

COURT FOR CROWN CASES RESERVED

IN

HILARY TERM, XXIX VICTORIA.

THE QUEEN *v.* FANNY SCHMIDT.

Receiving—Delivery by owner.

1866
Jan. 20.

Four thieves stole goods from the custody of a railway company, and afterwards sent them in a parcel by the same company's line addressed to the prisoner. During the transit the theft was discovered; and, on the arrival of the parcel at the station for its delivery, a policeman in the employ of the company opened it, and then returned it to the porter whose duty it was to deliver it, with instructions to keep it until further orders. On the following day the policeman directed the porter to take the parcel to its address, when it was received by the prisoner, who was afterwards convicted of receiving the goods knowing them to be stolen, upon an indictment which laid the property in the goods in the railway company:—

Held, by Martin, B., and Keating, and Lush, JJ. (*dissentientibus*, Erle, C.J., and Mellor, J.) that the goods had got back into the possession of the owner, so as to be no longer stolen goods, and that the conviction was wrong.

THE following case was stated by the Deputy-Chairman of Quarter Sessions for the Western division of the county of Sussex:—

John Daniels, John Scott, John Townsend, and Henry White were indicted for having stolen a carpet bag and divers other articles, the property of the London, Brighton, and South Coast Railway Company, and Fanny Schmidt for having feloniously received a portion of the said articles, well knowing the same to have been stolen.

On the 28th of July, 1865, two passengers by the prosecutors'

1866
THE QUEEN
v.
SCHMIDT.

line of railway left a quantity of luggage at the Arundel station, which luggage was shortly afterwards stolen therefrom. On the 29th of July, a bundle containing a portion of the stolen property was taken to the Angmering station, on the same line of railway, by the prisoner Townsend, and forwarded by him to the female prisoner, addressed, "Mrs. F. Schmidt, Waterloo Street, Hove, Brighton." The bundle was transmitted to Brighton in the usual course on Sunday morning, the 30th. Meanwhile, the theft had been discovered; and, shortly after the bundle had reached the Brighton station, a policeman (Carpenter) attached to the railway company opened it, and, having satisfied himself that it contained a portion of the property stolen from the Arundel station, tied it up again, and directed a porter (Dunstall), in whose charge it was, not to part with it without further orders. About 8 p.m. of the same day (Sunday, the 30th), the prisoner John Scott went to the station at Brighton, and asked the porter (Dunstall) if he had got a parcel from the Angmering station in the name of Schmidt, Waterloo Street. Dunstall replied, "No." Scott then said, "It is wrapped up in a silk handkerchief, and is directed wrong. It ought to have been directed to 22, Cross Street, Waterloo Street." Dunstall in his evidence added, "I knew the parcel was at the station: but I did not say so, because I had received particular orders about it." The four male prisoners were apprehended the same evening in Brighton, on the charge for which they were tried and convicted. On Monday morning, the 31st of July, the porter (Dunstall), by the direction of the policeman (Carpenter), took the bundle to the house, No. 22, Cross Street, Waterloo Street, occupied as a lodging-house and beer-house by the female prisoner and her husband, (who was not at home or did not appear), and asked if her name was Schmidt; on ascertaining which he left the bundle with her and went away. Carpenter and another policeman then went to the house, found the bundle unopened, and took the prisoner to the Town Hall. All the prisoners were found guilty; and I sentenced each of them to six months' imprisonment, with hard labour. They are now in Petworth gaol in pursuance of that sentence.

At the request of the counsel for the female prisoner, I consented to reserve for the opinion of this Court the question:—

Whether the goods alleged to have been received by her had not, under the circumstances stated, lost their character of stolen property, so that she ought not to have been convicted of receiving them with a guilty knowledge within the statute.

1866

 THE QUEEN
 v.
 SCHMIDT.

This case was argued on the 20th of January, 1866, before ERLE, C.J., MARTIN, B., and KEATING, MELLOR, and LUSH, JJ.

Pearce (*Willoughby* with him), for the prisoner. In consequence of the conduct of the railway company, the property lost its character of stolen property. The goods appear to have been sent in the ordinary course of business, and to have arrived on the 31st of July. After the bundle had reached the Brighton station, a policeman in the employ of the company not only opened the bundle, but tied it up again, and delivered it to a porter with special directions not to part with it until further orders. The railway company thereby exercised dominion over the property, and got it back into their hands, they being the owners, as the property was laid in them in the indictment. The case is the same as *Reg. v. Dolan*. (1) There, the goods were found by the owner in the pockets of the thief. The owner sent for a policeman, who took the goods, but subsequently returned them to the thief, who was sent by the owner to sell them where he had sold others. The thief then went to the shop of the prisoner, and sold the goods, and gave the money to the owner. Under those circumstances the prisoner was held to have been wrongly convicted of receiving the goods. That case overruled *Reg. v. Lyons* (2), where, under similar circumstances, the receiver was convicted.

Hurst, for the Crown. The facts in this case are distinguishable from *Reg. v. Dolan*. (1) Here the goods were in reality the goods of the passengers; and the company had no title as against the real owners.

[MELLOR, J. The company merely open the bundle in the course of transmission, and then send it on.]

When the policeman got hold of the goods, they were in the possession of the law, not in that of the company; and, when he let them go, it was as if he had not interfered at all.

(1) *Dears. C. C.* 436; 24 *L. J. (M. C.)* 59.

(2) *Car. & M.* 217.

1866

THE QUEEN
v.
SCHMIDT.

[MARTIN, B. The receipt of the goods is from the policeman in every sense; the porter, by his direction, goes to try if the prisoner will receive them. The goods were delivered to the prisoner for no *bonâ fide* purpose.

ERLE, C.J. Suppose a person is taking a basket of stolen wheat along a road, by direction of the thief, to an accomplice, and a policeman sees him, stops him, ascertains that the property is stolen, yet tells him to go on, and watches him deliver the wheat to the accomplice, could not the accomplice be convicted? In *Reg. v. Dolan* (1) Cresswell, J., distinguishes between the case of stolen goods being restored to the owner or being retained in the custody of the police. Here the porter seems not to have been informed that the property was stolen.

MARTIN, B. The policeman tells the porter not to part with the parcel; and the porter subsequently by his direction takes it to the prisoner. That being so, she was receiving it from the policeman; and, although at the time she believed she was committing a felony, she was not doing so.]

The prisoner really received the property from the company, as the innocent agents of the thief.

[MELLOR, J. The company sent the parcel to the address given by the thieves.

ERLE, C.J. The company were merely innocent bailees of the thief—a position which does not prevent the goods from being received as stolen goods. Many burglaries are committed by means of innocent agents.

MARTIN, B. When do goods cease to be stolen ?]

When they get back into the possession of the real owner. Suppose the policeman, instead of opening the bundle, had simply watched it without saying anything to the porter, surely then the goods would not have ceased to be stolen; and the addition of a manual prehension by the policeman cannot make any difference.

Pearce, in reply. The policeman was in the employ of the company; so that his interference was that of the company. Moreover, the thieves were actually taken into custody on the Sunday night, and the property was not sent on to the receiver until the Monday morning.

(1) Dears. C.C. 436; 24 L.J. (M.C.) 59.

ERLE, C.J. My own opinion is that the company were the innocent agents of the thieves, and that the female prisoner was rightly convicted; but, as the majority of the Court are of a different opinion, the conviction must be quashed. I also think that the company had such a property in the goods as to support the indictment.

1866
THE QUEEN
v.
SCHMIDT.

MARTIN, B. I am of opinion that this conviction is wrong. The property is either wrongly or rightly laid in the indictment; if rightly laid, there was a delivery by the owners after the goods had been returned to them.

KEATING, J. I agree with my Brother Martin. If the goods got back into the possession of the owner, then, according to *Reg. v. Dolan* (1), the conviction is wrong. In this case, the property is laid in the railway company; and they must be taken to be the owners. Then the property is stolen from them, and subsequently gets back into their possession. The felonious *transitus* was then at an end.

MELLOR, J. I agree with the Lord Chief Justice. The property is rightly laid in the company, because at the time of the larceny there was a bailment to them by the true owners. I concur in the propriety of the decision in *Reg. v. Dolan* (1); but there the goods got back into the possession of the true owner. In this case the policeman merely looked at the goods, and did not take possession of them.

LUSH, J. I agree with my Brother Martin. The goods were brought back into the possession of the company by the thief; and, if they had then carried them in the usual course, I should agree with the Lord Chief Justice. But, while the goods are in their possession, they are discovered to be the stolen property; and after that the railway company did not intend to carry them on in the usual course, but made a mere pretence of doing so, and really held them to the order of the true owner.

Conviction quashed.

Attorneys for prosecution: *Faithfull & Coode.*

Attorney for prisoner: *A. T. Mills.*

1866
Jan. 20.

THE QUEEN v. CALEB SHERLOCK.

Constable—Refusal to aid in the execution of his duty—Indictment.

An indictment for refusing to aid a constable in the execution of his duty, and to prevent an assault made upon him by persons in his custody with intent to resist their lawful apprehension, need not show that the apprehension was lawful, nor aver that the refusal was on the same day and year as the assault, or that the assault which the defendant refused to prevent was the same as that which the prisoners made upon the constable; neither is it any objection that the assault is alleged to have been made with intent to resist their lawful apprehension by persons already in custody.

THE following case was stated by the chairman of Quarter Sessions for the county of Sussex:—

At the general Quarter Sessions, holden at Lewes, on Monday, the 2nd of July, 1865, Caleb Sherlock was tried on an indictment of which the following is a copy:—

Sussex to wit—"The Jurors for our Lady the Queen upon their oath present that, heretofore and before the committing of the offence hereinafter mentioned, to wit, on the twenty-fifth day of May, in the year of our Lord One thousand eight hundred and sixty-five, Isaac Brown and James Brown were in the custody of James Newnham and George Parsons, constables of the East Sussex County Constabulary, and James Baldwin, a peace-officer in the parish of Rotherfield in the said county of Sussex, upon a charge of felony; and the said Isaac Brown and James Brown committed an assault upon the said constables and breach of the peace, with intent to resist their lawful apprehension. And the jurors further present that the said constables, there being a reasonable necessity for them to do so, called upon Caleb Sherlock, the defendant, for assistance, in order to prevent the said assault and a breach of the peace. And the jurors aforesaid further present that the defendant, Caleb Sherlock, did unlawfully, wilfully and knowingly refuse to aid and assist the said constables in the execution of their duty, or to prevent an assault and breach of the peace, against the peace of our said Lady the Queen, her Crown, and dignity."

The defendant's counsel submitted that the indictment was bad upon the following points:—

1. That the record did not shew a lawful apprehension of the two Browns.

1866

THE QUEEN
v.
SHERLOCK.

2. That there could not have been an assault to prevent their apprehension, the Browns being already apprehended.

3. That the record did not state that the refusal to assist was on the same day and year as the assault, or that it was the same assault; and that the merely stating a refusal was not sufficient, without an allegation that he did *not* aid and assist.

The Chairman did not withdraw the case from the jury; and the defendant was convicted, and ordered to pay a fine to Her Majesty of five pounds, which amount the defendant deposited with the deputy clerk of the peace, pending the decision of the Court for Crown Cases Reserved.

The opinion of the Court for Crown Cases Reserved is requested whether the defendant was lawfully convicted upon the above indictment.

This case was considered on the 20th of January, 1866, by ERLE, C.J., MARTIN, B., and KEATING, MELLOR, and LUSH, JJ.

No counsel appeared on either side.

The Court affirmed the conviction.

Conviction affirmed.

THE QUEEN v. PETER RICE AND MARY WILTON.

Jan. 20.

Disorderly house.

The defendants, as master and mistress, resided in a house to which men and women resorted for the purpose of prostitution, but no indecency or disorderly conduct was perceptible from the exterior of the house:—

Held, that the defendants were guilty of keeping a disorderly house.

THE following case was stated by the Deputy Recorder of the city of Chester:—

These defendants were tried before me at the quarter sessions for the city of Chester, on the 14th of July, 1865. The indictment upon which they were tried stated that they “unlawfully did keep and maintain a certain common ill-governed and disorderly house, and in the said house, for the lucre and gain of them, the

1866

THE QUEEN
v.
RICE AND
WILTON.

said Peter Rice and Mary Wilton, certain persons, as well men as women, of evil name and fame and of dishonest conversation, then and there unlawfully and wilfully did cause and procure to frequent and come together; and the said men and women, in the house of them, the said Peter Rice and Mary Wilton, at unlawful times, as well in the night as in the day, then and there to be and remain, drinking, tippling, whoring and misbehaving themselves, unlawfully and wilfully did permit, and yet do permit, to the great damage and common nuisance of all the liege subjects of our said Lady the Queen there inhabiting, being, residing, and passing, to the evil example of all others in like case offending, against the peace, &c."

It was proved that the prisoners acted as master and mistress of a house at Chester; that the house was frequented by prostitutes, who were constantly in the habit of bringing men there for the purposes of prostitution; and that this was done with the knowledge and assent of the prisoners. It was further proved that, when a prostitute brought a man to the house for such purpose, such prostitute and man were allowed by the prisoners to have the use of a bedroom in the house, either for a whole night or for a shorter period; that, when such prostitute and man occupied the room for a whole night, the sum of 5s. was charged by the defendants, and paid by the prostitute or man to the defendants for the use of the room; but that, when occupied for a shorter period, the sum of 2s. 6d. was charged by and paid to them. There was no evidence that any indecency or disorderly conduct was perceptible from the exterior of the house. It was contended, by the counsel for the defendants, that there was no proof that the house was so conducted as to be a common nuisance, and consequently that the indictment was not proved. He declined to address the jury, stating that he could not contest the truth of the facts above stated.

I directed the jury to find a verdict of *Guilty*; and a verdict of *Guilty* was entered. But I postponed judgment, until the opinion of the Court for Crown Cases Reserved upon the above case should be obtained; and the defendants were discharged on recognizance of bail to appear and receive judgment.

The question for the consideration of the Court is, whether

upon the facts so proved the defendants were guilty of an indictable offence as charged in the indictment.

1866

THE QUEEN
v.
RICE AND
WILTON.

This case was considered on the 20th of January, 1866, by
ERLE, C.J., MARTIN, B., and KEATING, MELLOR, and LUSH, JJ.

No counsel appeared on either side.

The Court affirmed the conviction.

Conviction affirmed.

END OF HILARY TERM.

CASES

DETERMINED BY THE

COURT FOR CROWN CASES RESERVED

IN

EASTER TERM, XXIX VICTORIA.

1866
April 28.

THE QUEEN v. JOHN PARSONS.

Returning from Transportation—Certificate of previous conviction—
5 Geo. 4, c. 84, s. 24; 8 & 9 Vict. c. 113, s. 1.

The certificate of a previous conviction required by 5 Geo. 4, c. 84, s. 24, is sufficient, by virtue of 8 & 9 Vict. c. 113, s. 1, if it purports to be signed by an officer having the custody of the records, although that officer is therein described as the deputy-clerk of the peace of a borough.

The certificate need not aver that the quarter sessions at which the prisoner was convicted were held by the recorder.

THE following case was stated by Pigott, B. :—

The prisoner was tried before me, at the last assizes for the city of Worcester and county of the same city, for being at large at St. Helen's, in Worcester, without lawful excuse, before the expiration of the term of fifteen years, for which term he had been transported at Birmingham quarter sessions on the 20th of October, 1854. The certificate of conviction was produced (1), signed by T. R. T.

(1) The certificate was as follows :—
“Borough of Birmingham—County of Warwick. These are to certify that, at the general quarter sessions of the peace of Our Lady the Queen, holden at Birmingham, in and for the borough of Birmingham, on Friday, the 20th day of October, in the year of our Lord 1854, John Parsons, late of the borough

aforesaid, was in due form of law tried and convicted on a certain indictment against him, for that he, on the 11th day of December, A.D. 1853, the dwelling house of Benjamin Woodhouse feloniously did break and enter, and two dresses, two shawls, one yard of silk, ten handkerchiefs, four waistcoats, one pair of trowsers, ten shirts, one scarf,

Hodgson, and with the following statement appended to the signature: "deputy-clerk of the peace for the said borough of Birmingham, and having the custody of the records of the said quarter sessions." The witness who produced the certificate proved that one Edmunds was the clerk of the peace, but that he did not usually act, and that Mr. Hodgson was the person who acted as clerk of the court in court. It was further proved by John Suckling, who is a member of the town council of Birmingham, that he was present at a meeting of the town council for the borough of Birmingham, when Mr. Hodgson was elected deputy-clerk of the peace of the borough; that he believed Mr. Edmunds sanctioned that election; and that Birmingham is a borough under the municipal corporation act.

Mr. Griffiths, on behalf of the prisoner, objected to the certificate on two grounds: First, that it was not signed by the proper officer (under the 5 Geo. 4, c. 84, s. 24) (1); and, secondly, that it

1866

THE QUEEN
v.
PARSONS.

and one top-coat, of the goods and chattels of the said Benjamin Woodhouse, then and there feloniously did steal, and was thereupon ordered by the Court to be transported for the term of fifteen years. Given under my hand this sixth day of March, 1866. T. R. T. Hodgson, deputy-clerk of the peace for the said borough of Birmingham, and having the custody of the records of the said quarter sessions.'

(1) The 5 Geo. 4, c. 84, s. 24, is as follows:—"The clerk of the court or other officer having the custody of the records of the court where such sentence or order of transportation or banishment shall have been passed or made, shall, at the request of any person on his Majesty's behalf, make out and give a certificate in writing, signed by him, containing the effect and substance only (omitting the formal part) of every indictment and conviction of such offence and of the sentence or order for his or her transportation or banishment (not taking for the same more than six shillings and eightpence), which certifi-

cate shall be sufficient evidence of the conviction and sentence, or order for the transportation or banishment of such offender; and every such certificate, if made by the clerk or officer of any court in Great Britain, shall be received in evidence, upon proof of the signature and official character of the person signing the same."

By the 8 & 9 Vict. c. 113, s. 1, it is enacted that, "Whenever by any act now in force or hereafter to be in force, any certificate, official or public document, or document or proceeding of any corporation or joint-stock or other company, or any certified copy of any document, bye-law, entry in any register or other book, or of any other proceeding, shall be receivable in evidence of any particular in any court of justice, or before any legal tribunal, or either house of parliament, or any committee of either house, or in any judicial proceeding, the same shall respectively be admitted in evidence, provided they respectively purport to be sealed or impressed with a stamp, or sealed and signed, or signed

1866
THE QUEEN
v.
PARSONS.

ought to shew on the face of it that there were justices of the peace present at the quarter sessions where the conviction took place.

I overruled the objections; and the prisoner was convicted: but judgment was respited for the purpose of taking the opinion of the Court on these objections. If the Court should be of opinion that either of these objections is valid, then a verdict of acquittal is to be entered; if the Court think that neither objection is good, the conviction is to stand.

This case was argued on the 28th of April, 1866, before Pollock, C.B., Bramwell, B., Byles, J., Pigott, B., and Lush, J.

Harington, for the prisoner. The clerk of the peace for a borough is appointed under the municipal corporation acts, which give no power to appoint a deputy; and there could not, therefore, be such an officer as the deputy-clerk of the peace for a borough. Neither is there any evidence that Mr. Hodgson had the custody of the records.

[POLLOCK, C.B. The legal inference is that he had the custody of them, seeing that it is proved that he acted as clerk of the court in court.]

The certificate must mean that Mr. Hodgson had the custody of the records as deputy-clerk of the peace; and, as there can be no such officer, he cannot have the custody of the records.

[POLLOCK, C.B. It is unnecessary to discuss the question whether there can be a deputy-clerk of the peace in a borough, as we are all of opinion that the statement that Mr. Hodgson acted as the clerk of the court, and had the custody of the records, is a sufficient compliance with the 8 & 9 Vict. c. 113, s. 1.]

Secondly, the certificate is bad, because it does not aver that the sessions were held by the recorder. By the 5 & 6 Wm. 4, c. 76, s. 105, in a borough the recorder is to be the sole judge of the

alone, as required, or impressed with a stamp and signed, as directed by the respective acts made or to be hereafter made, without any proof of the seal or stamp, where a seal or stamp is necessary, or of the signature or of the offi-

cial character of the person appearing to have signed the same, and without any further proof thereof in every case in which the original record could have been received in evidence."

court of quarter sessions; but by s. 103, in the absence of the recorder, the mayor is directed to hold and adjourn the court.

[PIGOTT, B. He is to open and adjourn the court, and to respite the recognizances; but he is not authorized to sit as a judge for the trial of offenders.]

Underdown, for the prosecution, was not called upon.

POLLOCK, C.B. We are all of opinion that the certificate was sufficient, and was sufficiently authenticated, and that the prisoner was properly convicted.

BRAMWELL, B. If it had been shewn that a person without any de facto official character had signed the certificate, our decision might have been different; but here we have a de facto officer, who, by virtue of that office, has the custody of the records equally as if he were the officer de jure.

Conviction affirmed.

Attorney for prosecution: *The Solicitor to the Treasury.*

Attorney for prisoner: *Clutterbuck, Worcester.*

THE QUEEN v. PAYNE.

April 28.

Prison-breach—*The Prison Act*, 1865 (28 & 29 Vict. c. 126), s. 37.

The Prison Act, 1865 (28 & 29 Vict. c. 126), s. 37, which forbids the conveyance into any prison, with intent to facilitate the escape of a prisoner, of any mask, dress, or other disguise, or of any letter, or of any other article or thing, includes a crowbar.

THE following case was stated by the Chairman of quarter sessions for the county of Surrey:—

At the general quarter session of the peace, holden by adjournment at Saint Mary Newington, in and for the county of Surrey, on the 20th of March, 1860, Elizabeth Payne was tried and convicted on an indictment charging her with conveying into the common gaol at Newington a crowbar, with intent to facilitate the escape of a prisoner therein being. The indictment was framed under section 37 of the Prison Act, 1865, which is as follows:—"Every person who aids any prisoner in escaping or

1866
THE QUEEN
v.
PAYNE.

attempting to escape from any prison, or who, with intent to facilitate the escape of any prisoner, conveys or causes to be conveyed into any prison any mask, dress, or other disguise, or any letter, or any other article or thing, shall be guilty of felony, and on conviction be sentenced to imprisonment with hard labour for a term not exceeding two years."

The counsel for the prisoner objected that a crowbar did not come within such section; and the Court reserved such point for the decision of the Court for the consideration of Crown Cases Reserved.

This case was argued on the 28th of April, 1866, before Pollock, C.B., Bramwell, B., Byles, J., Pigott, B., and Lush, J.

J. Thompson, for the prisoner. The words "any other article or thing" must be taken to mean any other article or thing ejusdem generis with "mask, dress, disguise, or letter." In *Kitchen v. Shaw* (1), which arose under the 6 Geo. 3, c. 25, s. 4, it was held that the words, "or other person," following after an enumeration of divers kinds of workmen, must be confined to persons of the same description as those before enumerated. So also in *Sandiman v. Breach* (2), Lord Tenterden states that "where general words follow particular ones, the rule is to construe them as applicable to persons ejusdem generis." The 43rd section of the former act (the 4 Geo. 4, c. 64), had after the words "mask, vizor, or other disguise," the words "or any instrument or arms." The statute in question, which repeals that section, leaves out the words "instrument or arms" altogether.

[POLLOCK, C.B. It substitutes the more general words "any article or thing."

PIGOTT, B. Clearly shewing thereby that the legislature intended to embrace more things than were included under the old act.]

It was unnecessary to specify mask, dress, disguise, or letter, if the words "article or thing" were intended to include everything.

Straight, for the prosecution, was not called upon.

(1) 6 Ad. & E. 729. See also *Reg. v. Silvester*, 33 L. J. (M. C.) 79.

(2) 7 B. & C. at p. 100.

POLLOCK, C.B. We are all of opinion that a crowbar is included under the words "or any other article or thing." 1866

Conviction affirmed.

THE QUEEN
v.
PAYNE.

Attorney for prosecution: *Smallpeice.*

Attorney for prisoner: *Neale.*

THE QUEEN v. CARPENTER.

April 28.

Embezzlement—Assistant Overseer.

A person who is nominated and elected assistant overseer under the 59 Geo. 3, c. 12, s. 7, by the inhabitants of a parish in vestry, and who is afterwards appointed assistant overseer by the warrant of two justices, and performs the duties of an overseer, is well described in an indictment for embezzlement as the servant of the inhabitants of the parish.

THE following case was stated by Montague Smith, J. :—

The prisoner was indicted before me at the last assizes for the county of Gloucester for embezzlement, and found guilty. He had been assistant overseer of the poor of the parish of Oddington, and was charged in one count of the indictment as the servant of John Ledgeley, Henry Collett, George Foden, and Henry Lyne, who were the churchwardens and overseers of the said parish. In another count he was alleged to be the servant of the churchwardens and overseers of the said parish. In a third count he was alleged to be the servant of the inhabitants of the said parish. The prisoner was nominated and elected assistant overseer by the inhabitants in vestry, who determined that the duties to be executed and performed by him should be "all such duties as appertain and are incident to the office of an overseer," and fixed the yearly salary of 3*l.* 10*s.* for the execution of the office. On the 30th of March, 1865, an order of two justices reciting the election of the vestry appointed the prisoner to the said office. The prisoner, in point of fact, performed all the duties of overseer of the poor of the parish; and the churchwardens and overseers did not interfere with him. It was proved that the prisoner fraudulently appropriated to his own use moneys which he had received for poor's rate by virtue of his office as assistant overseer, under

1866
THE QUEEN
v.
CARPENTER.

certain rates made for the relief of the poor of the said parish. I reserved for the opinion of this Court the question whether the prisoner was clerk or servant of any of the persons mentioned in the indictment, and received and took into his possession the moneys embezzled as such clerk or servant within the meaning of the statute 24 & 25 Vict. c. 96, s. 67.

This case was argued on the 28th of April, 1866, before Pollock, C.B., Bramwell, B., Byles, J., Pigott, B. and Lush, J.

No one appeared for the prisoner.

Harington for the prosecution. The prisoner was appointed under the 59 Geo. 3, c. 12, s. 7 (1); and the question in the case is decided by *Reg. v. Watts* (2), in which Lord Denman, C.J., says of an assistant overseer, "He is not the servant of the churchwardens and overseers of the parish, but of the vestry, from whom he directly receives his authority." That dictum was quoted with approbation in *Points v. Attwood*. (3) By the 12 & 13 Vict. c. 103, s. 15, it is enacted that assistant overseers appointed by the guardians under the authority of the Poor-law Board shall

(1) That section is as follows:—"It shall be lawful for the inhabitants of any parish in vestry assembled to nominate and elect any discreet person or persons to be assistant overseer or overseers of the poor of such parish, and to determine and specify the duties to be by him or them executed and performed, and to fix such yearly salary for the execution of the said office as shall by such inhabitants in vestry be thought fit; and it shall be lawful for any two of his Majesty's justices of the peace, and they are hereby empowered, by warrant under their hands and seals, to appoint any person or persons who shall be so nominated and elected to be assistant overseer or overseers of the poor, for such purposes and with such salary as shall have been fixed by the inhabitants in vestry; and such salary shall be paid out of the money raised for the relief of the poor at such times and in such

manner as shall have been agreed upon between the inhabitants in vestry and the respective persons so to be appointed; and every person to be so appointed assistant overseer shall be, and he is hereby authorized and empowered to execute all such of the duties of the office of overseer of the poor as shall in the warrant for his appointment be expressed, in like manner and as fully, to all intents and purposes, as the same may be executed by any ordinary overseer of the poor; and every person or persons so appointed shall continue to be an assistant overseer of the poor until he or they shall resign such office, or until his or their appointment shall be revoked by the inhabitants of the parish in vestry assembled, and no longer."

(2) 7 Ad. & E. 461, 469.

(3) 6 C. B. 38, 49. See also the judgment of Byles, J., in *Baker v. Locke*, 34 L. J. (C.P.) 49.

be described as the servants of the inhabitants of the parish, which seems a valid reason for holding that that is the proper description of an assistant overseer appointed by the vestry.

1866
THE QUEEN
v.
CARPENTER.

POLLOCK, C.B. We are all of opinion that the conviction is good.

Conviction affirmed.

Attorneys for prosecution: *Dyne & Harvey*; for A. W. & H. N. Knott, *Worcester*.

THE QUEEN v. REARDON AND BLOOR.

April 28.

Receiving—Joint indictment—Separate receipt—24 & 25 Vict. c. 96, s. 94.

The 24 & 25 Vict. c. 96, s. 94, which enacts that, "If, upon the trial of any two or more persons indicted for jointly receiving any property, it shall be proved that one or more of such persons separately received any part or parts of such property, it shall be lawful for the jury to convict, upon such indictment, such of the said persons as shall be proved to have received any part or parts of the said property," extends to cases where, upon an indictment for a joint receipt, it is proved that the prisoners separately received *the whole* of the stolen property.

THE following case was stated by Lush, J.:—

The prisoners were jointly indicted before me at Manchester for receiving stolen goods, knowing them to have been stolen. There was no evidence of a joint receipt; but Reardon, who kept a house of her own, was in the practice of receiving stolen property from the thief or his accomplice, and of selling it to Bloor, who also had a place of business of his own. The jury found each guilty. I sentenced Bloor; but, an objection having been taken that upon the indictment a conviction of both could not stand, I respited the sentence against Reardon, and reserved for the opinion of the Court of Criminal Appeal the question whether the conviction against her is sustainable upon this indictment.

This case was argued on the 28th of April, 1866, before Pollock, C.B., Bramwell, B., Byles, J., Pigott, B., and Lush, J.

Cottingham, for the prisoner Reardon. The question in this case is whether, upon an indictment of two persons for a joint receipt, both can be convicted, when no joint receipt, but only a separate receipt, at different times, is proved. Before the 14 & 15 Vict.

1866
THE QUEEN
v.
REARDON AND
BLOOR.

c. 100, if two or more persons were jointly indicted for receiving, and no joint act of receiving was proved, the prosecutor was put to his election; and could only convict one of them: *R. v. Messingham*. (1) The 14 & 15 Vict. c. 100, s. 14, remedied this inconvenience to some extent; and, although that section is now repealed, it has been re-enacted by the 24 & 25 Vict. c. 96, s. 94, which provides that, "if, upon the trial of any two or more persons indicted for jointly receiving any property, it shall be proved that one or more of such persons separately received any part or parts of such property, it shall be lawful for the jury to convict upon such indictment, such of the said persons as shall be proved to have received any part or parts of such property." That section, however, only applies to a separate receipt of different parts of the stolen property at the same time, leaving the old law to operate where there has been a separate receipt of the whole at successive times.

[POLLOCK, C. B. A man who receives the whole of the stolen property receives a part; for the whole embraces all the parts.

BRAMWELL, B. The old-fashioned indictment would have alleged that the two prisoners "then and there" (i.e., at the same time and place) received the goods; and in this case that averment could not have been proved.]

This point was raised in *Reg. v. Dring* (2), but was not decided. By the 24 & 25 Vict. c. 96, s. 93, any number of receivers at different times of the stolen property, or of any part thereof, may be charged with substantive felonies in the same indictment; but the proper mode of carrying out that enactment is to indict them for separate receipts in different counts, and not, as was done here, to indict them for a joint receipt in a single count.

Sowler, for the prosecution, was not called upon.

POLLOCK, C. B. The object of the enactment in question was to do away with certain technical objections which prevailed previously. By the 93rd section any number of receivers of the same stolen property, or of different parts of it, may be indicted together, although there has been no joint receipt; and it is clear that, under that section, no distinction is made between separate receipts at the same time and separate receipts at

(1) 1 Moo. C. C. 257.

(2) Dears. & B. C. C. 329.

different times. That section throws light on the 94th; and, although there is some colour for the objection, we are all of opinion that no distinction can be made for the purposes of that section between a separate receipt of the whole and a separate receipt of part of the stolen property. It would be absurd to convict both prisoners, if it were proved that each separately received a part, and to acquit one, if it were proved that each separately received the whole.

1866
THE QUEEN
v.
REARDON AND
BLOOR.

Conviction affirmed.

Attorney for prosecution: *Talbot*, Manchester.

Attorney for prisoner: *W. Bennett*, Manchester.

THE QUEEN v. WHITEHEAD.

May 5.

Witness—Incompetency—Withdrawal of evidence from jury.

The evidence of an incompetent witness may be withdrawn from the jury upon the incompetency appearing during his examination-in-chief, although he has been examined previously on the *voir dire* and pronounced to be competent.

THE following case was stated by the Chairman of quarter sessions for the hundred of Salford, in the county of Lancaster:—

Holinrake Whitehead was tried before me at Salford, upon the 27th of October, 1865, upon an indictment charging him with an assault upon one Harriet Pugh, with intent the said Harriet Pugh to ravish and carnally know. There were two other counts in the indictment, one of them charging an indecent assault, and the other a common assault. The said Harriet Pugh is about seventeen years old, and has always been deaf and dumb. At the trial it was proposed by the counsel for the prosecution to examine her through the medium of her father. It was stated that he and her sister could hold communication with her by means of arbitrary signs and motions, but that she had not been instructed in the deaf-and-dumb alphabet, or in any institution, or by any person skilled in communicating with persons labouring under the deprivation with which she is afflicted. The father was sworn truly to interpret in the case, and was requested by the counsel for the prosecution to explain to her the oath about to be administered to

1866
THE QUEEN
v.
WHITEHEAD.

her. He then stated that he believed she was unaware of the nature and obligation of an oath, and that (although she had attended Sunday school for some years) he was not prepared to say that she believed in a future state or a condition of future rewards and punishments. Upon this it was objected by the counsel for the defendant that she could not be sworn; and the counsel for the prosecution proposed to give evidence independent of the prosecutrix in proof of the offence charged. It was objected that such evidence, in the absence of the direct testimony of the prosecutrix herself, could not be received on such a charge. I did not at the time decide upon this objection; but I caused a person named Beahan, an expert in regard to the education of, and communication with, deaf and dumb persons, to be summoned to the court for the assistance of myself and the jury in the case. The expert attended forthwith; and, before being sworn to interpret, I requested him to endeavour to communicate with the prosecutrix, and particularly to ascertain the extent of her intelligence as to the nature and obligation of an oath. He did so, and intimated his belief that he was able to understand her signs and gestures, and to make himself understood by her, and that she comprehended him when he conversed by signs with her as to Heaven and Hell. He was then sworn to interpret; and she, through him, was sworn in the ordinary form. The examination, through him, then proceeded some way; and, among other replies so obtained from the prosecutrix, was one, that she had consented to what the defendant did to her. She answered, "Yes," to almost every question put to her. She was asked whether she knew the counsel who was examining her. To this she answered "Yes." The expert at this point informed the Court that he was satisfied he had been mistaken; that the prosecutrix had not been able to understand him; and that the means of communication were, from want of training and otherwise, so defective that he felt it would be unsafe in the extreme to proceed with her examination through him or otherwise. Before coming to this conclusion he again tested her in various ways; and the Court and jury were of opinion that any further examination of the girl under the circumstances would be most unsatisfactory. The counsel for the prosecution then applied that the jury should be discharged from returning a verdict, and that the trial should be

adjourned to a further session, in order that in the interval the girl might be sent to a deaf-and-dumb school and properly instructed. Feeling myself bound by the authority of *R. v. Wade* (1), I refused the application. Counsel for the prosecution then proposed to enter into the evidence of other witnesses in support of the charge, when the objection before-mentioned was revived. After argument I overruled the objection, and admitted the evidence, which was in substance as follows:—

About 8.30 p.m. on the night in question, two girls—one, the sister of the prosecutrix—and a young man who had been walking on a foot road to a place called Car Laithe, in the outskirts of Todmorden, were returning homewards in the direction of Todmorden, when they heard a noise which caused them to stand and listen. It was repeated. The sister recognised it as the cry of the prosecutrix; and at her request the others accompanied her, all three running, in the direction whence the noise proceeded. It was repeated several times as they approached. After running about a hundred yards, they found the prosecutrix on the ground across the foot-road with her clothes thrown upwards over her knees and the defendant on his knees in the act of rising from her. The male witness seized him by the collar, and pulled him off the prosecutrix. His trousers also were down. He was seized by the male witness, who (having recognised him and spoken to him by his nickname, "Darling") ultimately released him, and left him on the spot seeking his cap. Meanwhile the prosecutrix rose up. Her bonnet was crushed; her dress soiled with sand; her hair dishevelled. She was in tears, and put her hand several times to her chest. The footpath on which she was found is on the edge of a valley; and a witness resident on the opposite bank of the valley heard screams from the direction of this road about the time spoken to by the other witnesses. The road for a considerable length is skirted on each side by a wood, after emerging from which, as it approaches the place where the prosecutrix was found with the defendant as aforesaid, it is separated from the fields for a certain length by a hurdle fence on one side of the road only; after which there ceases to be any fence, and access to the fields and the wood is very easy from the road. It was on the part of the road above

1866

THE QUEEN
v.
WHITEHEAD.

(1) 1 Moo. C. C. 86.

1866

THE QUEEN
v.
WHITEHEAD.

the hurdle fence that the prosecutrix was found. The foot-road in question is a public foot-road, and is distant nearly half a mile from the residence of prosecutrix, and is known by the name of the "Lover's Walk." The evidence did not shew for what purpose the prosecutrix had gone thither; but it was proved that she had previously gone the same walk with her sister. All the witnesses (except the resident of the other side of the valley) had known the defendant for many years. He worked at the same mill as they did. He had never visited at the house of the prosecutrix, or paid his addresses to her; nor, as far as the evidence went, had there been any association between him and her. On cross-examination of prosecutrix's sister, she admitted that a man had been charged with an assault with intent, &c., upon her sister, the prosecutrix, four or five years ago, but that the case was dismissed by the magistrates.

At the close of the case for the prosecution, the counsel for the defendant called my attention to the fact that prosecutrix had been duly sworn, and then withdrawn as above stated, and he then submitted that there was no case to go to the jury in the absence of her testimony denying that what was spoken to by the witnesses was done with her consent. I overruled the objection, and held that the evidence given was such as was sufficient to go to the jury in support of the charge; but at counsel's request I reserved the point for the opinion of the Court. The defendant called witnesses to prove an alibi; but the jury found him guilty of an assault with intent to ravish.

I therefore respectfully desire the opinion of this Court upon the following points: first, was it competent for and obligatory upon me to discharge the jury under the circumstances in order that an opportunity might be afforded for the instruction of the prosecutrix; and, secondly, was it competent for me to leave the case to the jury upon the evidence above appearing, withdrawing the doubtful evidence of the prosecutrix herself, and confining their attention entirely to the testimony of the other witnesses.

This case was argued on the 5th of May, 1866, before Pollock, C.B., Martin, Bramwell, and Piggott, BB., and Montague Smith, J.

Torr, for the prisoner. The judge had no right to withdraw the

prosecutrix's evidence from the jury, after he had once decided to admit it. She was not an incompetent witness, but merely a witness difficult to understand. Her conduct—her very look might have thrown light on the transaction. The judge should have told the jury, it was not reliable evidence; but that, if her conduct during the trial had been such as to throw light on the matter, they were perfectly at liberty to take that into consideration; and the jury would have been justified in acting on that suggestion. *Reg. v. Hill* (1) is directly in the prisoner's favour. That was the case of a lunatic witness; and it was held that the lunatic might be examined and cross-examined, and witnesses called on either side, in order to determine the question of his competency; but that, when admitted, it was for the jury to attach what weight they thought fit to his testimony. In that case Lord Campbell, C.J. said, in answer to an argument of the witness's incompetency drawn from his cross-examination after he was sworn, "What you got out on cross-examination was for the jury, not for the judge. You cannot avail yourself of anything that took place after the insane person was sworn."

1866
THE QUEEN
v.
WHITEHEAD.

[POLLOCK, C.B. Insanity is not quite in point; as partial insanity will not render the witness's evidence inadmissible.]

In *Jacobs v. Layborn* (2), a witness for the defendant, to whom several questions had been put on his examination-in-chief, stated, in answer to a question put to him by the plaintiff's counsel who had interposed, that he was answerable to the defendant's attorney for the costs, and was therefore objected to as incompetent; and it was held that the objection did not come too late. But that case is distinguishable on the ground that there was no examination on the *voir dire*; while here there was a most careful preliminary examination, and a decision that the witness was competent.

C. H. Hopwood, for the Crown. In this case there was a preliminary objection to the competency of the witness and a preliminary inquiry. The judge subsequently thought a further inquiry necessary; and the result was that after further examination he discovered that the evidence was altogether unsatisfactory; and he was right in striking that evidence out.

[POLLOCK, C.B. He was, if it was a question of law.]

(1) 2 Den. C. C. 254.

(2) 11 M. & W. 685.

1866

THE QUEEN
v.
WHITEHEAD.

It was a question of competency, and that is for the judge. In *Jacobs v. Layborn* (1) Rolfe, B., says: "Does it necessarily follow that the examination on the *voir dire* is to precede the examination-in-chief?" Lord Abinger, in his judgment in the same case, says (2): "To this I can add the testimony of my own experience, which has been of more than forty years, that, whenever a witness was discovered to be incompetent, the judge always struck the evidence which he had given out of his notes." In *Reg v. Garner* (3), where a confession, which afterwards turned out to be inadmissible, was received in evidence, Patteson, J., was of opinion that the proper course would have been for the judge to have struck the evidence of the confession out of his notes. The same practice is adopted in courts of equity. Lord Eldon, C., in *Vaughan v. Worrall*, (4) says: "When, after the witness has been cross-examined to the bone, on the last question it appears that he has an interest in the suit, the judge must say that no attention could be given to his evidence." Again, in *Needham v. Smith* (5) Lord Keeper King says: "Though a witness is examined an hour together at law, if in any part of his evidence it appears that he was a party interested, the Court will direct the jury that he is no witness, nor any regard to be had to his evidence." [He was then stopped.]

Torr, in reply. In *Yardley v. Arnold* (6) Parke, B., says: "I cannot help wishing very much that it were established as the regular practice, that, when once a witness is sworn, no question should be put to him in order to raise questions to his competency. I think all such should be put on the *voir dire*, and that, when once sworn-in-chief, his competency should be taken for granted."

POLLOCK, C.B. The first question is a hypothetical, not a practical question, and one which we are not bound to answer.

As to the second question, whether it was competent for the chairman to leave the case to the jury upon the evidence of the other witnesses, and to withdraw from their consideration altogether the evidence of the prosecutrix, we are all of opinion

(1) 11 M. & W. at p. 688.

(2) *Ib.* p. 690.

(3) 2 Car. & K. 920.

(4) 2 Sw. 400.

(5) 2 Vern. 464.

(6) 10 M. & W. 141, 145. Parke, B., adds, however, "But certainly the practice has been different hitherto."

that it was competent for him to do so. A witness was sworn to interpret, who thought that he had got into communication with the prosecutrix's mind. Of that notion he was soon disabused; and the judge, when he found her incompetent, did what he had a perfect right to do—he withdrew her evidence, and directed the attention of the jury merely to the testimony of the other witnesses. That would not prevent the jury from taking notice of anything in the conduct of the prosecutrix which might seem to be favourable to the prisoner.

1866

THE QUEEN
v.
WHITEHEAD.

Conviction affirmed.

Attorney for prisoner: *Stansfield*, Todmorden.

THE QUEEN v. FLETCHER.

May 7.

Rape—Idiot—Consent.

Upon an indictment for rape there must be some evidence that the act was without the consent of the woman, even where she is an idiot.

In such a case, where there were no appearances of force having been used to the woman, and the only evidence of the connection was the prisoner's own admission, coupled with the statement that it was done with her consent, the court held that there was no evidence for the jury.

THE following case was stated by KEATING, J.:—

Charles Fletcher was tried before me, at the last assizes for the county of Warwick, for a rape upon Fanny Elizabeth Churchill, and convicted. The prosecutrix was an idiot girl, with one side and a foot paralysed. She was seen going with the prisoner towards the inn where he was ostler, and afterwards coming from thence with her hair down, and the hair-net in her hand, but, as her mother said, “not different from her ordinary manner;” she had three cakes in her hand, and was eating one of them. There was no evidence of the circumstances under which the connection had taken place; but the prisoner admitted the fact, alleging consent, and that he had had connection with her before, also with her consent. In answer to his question whether she knew him, she said, “Yes; the man at Richards’.” Although only sixteen years old, the medical man stated she was a fully

1866
THE QUEEN
v.
FLETCHER

developed woman, and that strong animal instincts might exist, notwithstanding her imbecile condition. Appearances on examination were not inconsistent with connection having previously taken place, and he rather inclined to that opinion; but they were also consistent with the connection in question being a first connection.

I left the case to the jury in the terms reported to have been used by Willes, J., in *Reg v. Fletcher* (1), viz., That, if they were satisfied that the girl was incapable of expressing consent or dissent, and that the prisoner had connection with her without her consent, they should find him guilty; but that a consent produced by mere animal instinct would be sufficient to prevent the act from constituting a rape. The jury found the prisoner guilty.

I desire the opinion of the Court of Criminal Appeal as to whether I ought to have left the case to the jury at all, there being no evidence against the prisoner, except the fact of connection and the imbecile state of the girl.

This case was considered on the 7th May, 1866, by Pollock, C.B., Martin, Bramwell, and Pigott, BB., and M. Smith, J.

No counsel appeared on either side.

POLLOCK, C.B. The question in this case is whether there was any evidence to go to the jury. Of the physical fact there could be no doubt whatever; but no evidence was given on behalf of the crown that what was done to the girl was against her will or without her consent. We are all of opinion that some evidence of that kind ought to have been given, and that in its absence there was no case to go to the jury. For myself I may add that in my opinion the act which makes the carnal knowledge of a girl of tender years penal (2) throws some light upon this case. A girl of tender years is incapable of consenting; and, therefore, if mere incapacity to consent were sufficient to constitute the crime of rape, that part of the act would have been unnecessary.

Conviction quashed.

(1) Bell C. C. 63.

(2) The 24 & 25 Vict. c. 100, ss. 50, 51.

CASES

DETERMINED BY THE

COURT FOR CROWN CASES RESERVED

IN

TRINITY TERM, XXIX VICTORIA.

THE QUEEN v. BOWERS.

Embezzlement—Clerk or servant.

1866
June 9.

A person who is employed to get orders for goods, and to receive payment for them, but who is at liberty to get the orders and receive the money where and when he thinks proper, being paid by a commission on the goods sold, is not a clerk or servant within the meaning of the 24 & 25 Vict. c. 96, s. 68.

THE following case was stated by the assistant judge of the Middlesex Sessions :—

Samuel Bowers was tried before me at the Sessions of the Peace for Middlesex on the 10th of January, 1866, upon an indictment which charged him with having feloniously embezzled several sums of money, the property of John Clark, by whom, it was alleged, he was employed as clerk and servant. The prisoner was employed by the prosecutor under an agreement dated May 9th, 1864, of which the following is a copy :—

“Memorandum of agreement made and entered into this 9th day of May, 1864, between Samuel Bowers of the one part, and Robert Skirrow, John Clark, and John Quick, coal owners and merchants, of the other part, witnesseth, that the said Samuel Bowers hereby agrees to become, and the said Skirrow, Clark, and Quick agree to engage the said Samuel Bowers as, their agent or traveller for the sale of coals, one guinea per week to be paid to the said Samuel Bowers as salary, and one shilling per ton to be paid as commission upon all coals sold by him when the prices realized are in

1866
THE QUEEN
v.
BOWERS.

accordance with the current prices delivered; any dealers he may be the means of securing as customers to the wharf, sixpence per ton to be paid for such services; two shillings and sixpence to be paid for cartage and delivery of coals. The said Samuel Bowers likewise agrees to collect all moneys in connection with his orders; but the said Skirrow, Clark, and Quick will not hold him responsible for any bad debts that may be contracted, but expect him to be as cautious as practicable in securing good and solvent customers: the before-mentioned commission not to become due until the money has been received by the said Skirrow, Clark, and Quick. The said Samuel Bowers also agrees not to keep or retain in his possession moneys collected on behalf of the said Skirrow, Clark, and Quick more than one week from the date of receiving the same. The said Skirrow, Clark, and Quick agree to take the board and blinds now fitted up at the residence of the said Samuel Bowers at the cost price to him, on condition that they have free use, without charge, of that part of his residence now used as an office. It is mutually agreed that, should dissatisfaction arise on either side, a month's notice in writing must be given."

In June, 1865, the prisoner was desirous of selling coals by retail on his own account; and the prosecutor consented to supply him with coals for that purpose, but then made an alteration in the mode of remunerating him, which is specified in a letter, of which the following is a copy:—

Mr. Samuel Bowers,

"London, June 3rd, 1865.

Dear Sir,

As you are now going into the retail coal trade on your own account, we think it best to have a proper understanding; and in future we pay you a commission only—your salary will be stopped from this date. We find a very large amount standing against you; and we particularly request you to do all you possibly can to get it in. The writer will wait upon you on Wednesday at the usual time, and hopes you will have a large amount of money ready.

Yours truly,

Skirrow, Clark, & Quick."

The prisoner consented to the proposed alteration, and continued to obtain orders from various persons for coals, which were sup-

plied by the prosecutor, the invoices being made out in the name of the prosecutor's firm; and in the three instances charged in this indictment such invoices were produced by the customers, who proved payment of the several amounts in such invoices to the prisoner, whose receipt was attached to each invoice. The prisoner did not account to the prosecutor for either amount. The manner of accounting was for the prosecutor to call on the prisoner weekly, who then paid him a sum of money on account of what he had received; and once a month the prisoner attended at the prosecutor's office, when the names of the customers who had been supplied with coals were called over, and the prisoner stated whether they had paid, handing over in respect of the amounts he reported as having been paid the surplus beyond his weekly payments on account. He did not report that either of the sums in this indictment had been paid, but, on the contrary, represented them as still due after he had received the money. The coals supplied for the purpose of his retail trade were charged to him as to other customers; but this account was kept quite distinct from the account of the moneys received by the prisoner on the prosecutor's account.

1866
THE QUEEN
v.
BOWERS.

The sums alleged to have been embezzled were not received by the prisoner until after the second agreement had been made; and at the prisoner's place of business a board was exhibited, describing him as agent to the prosecutor. It was contended that he was not a clerk or servant to the prosecutor within the meaning of the statute. I declined to stop the case; and the jury found the prisoner guilty.

The question for the opinion of the Court is, whether the prisoner, under the circumstances herein stated, was a clerk or servant to the prosecutor, so as to be liable to be convicted of the crime of embezzlement.

This case was argued on the 9th of June, 1866, before Erle, C.J., Martin, Bramwell, and Channell, BB., and Shee, J.

Collins, for the prisoner. The prisoner was not a clerk or servant within the meaning of the act. (1) In *Reg. v. Walker* (2),

(1) The 24 & 25 Vict. c. 96, s. 68.

(2) Dears. & B. (C. C.) 600; 27 L. J. (M.C.) 207.

1866
THE QUEEN
v.
BOWEN.

the prisoner was employed to go through the country and see the farmers and get orders for manure, and was paid by a commission in addition to a nominal salary of 1*l.* per annum. It did not, however, appear that he had undertaken to give any definite quantity of time or labour to the business; and the Court held that he was an agent and not a servant. In *Reg. v. May* (1), the prisoner was appointed an agent to get orders for iron, and was paid by a commission; and it was held that he was not a servant. In the former case (2), Bramwell, B., says: "It seems to me that the difference between the relations of master and servant, and of principal and agent, is this:—A principal has a right to direct what the agent has to do; but a master has not only that right, but also the right to say how it is to be done." In this case the prosecutor had no right to control the prisoner in the use of his time; he was free to get orders or not as he liked. In *Reg. v. Tite* (3), a commercial traveller was held to be a servant; but a commercial traveller is bound to obey his employer, and must go here or there and do this or that according to orders.

Metcalfe (*Harington* with him), for the Crown. The prisoner was a servant in this sense, that it was his duty, and he could have been compelled, to get the money upon the orders he had obtained, if he could not have been compelled to get the orders. In *Reg. v. May* (4), Williams, J., bases his judgment upon the fact that the prisoner was not employed to receive money. In *Reg. v. Batty* (5) the prisoner was held to be a servant, although he was in the service of more masters than one, and, although it did not appear that he devoted any particular portion of his time to the service of the prosecutor.

[ERLE, C.J. In order to constitute the relation of master and servant, the inferior must be under more control than is implied in having the option of getting orders with the right to receive a commission thereon.]

There are, no doubt, certain cases, as, for instance, that of an insurance agent, in which the relation is not that of master and

(1) Leigh & Cave (C.C.) 13; 30 L. J. (M.C.) 81.

(2) See the 27 L. J. (M.C.) 208.

(3) Leigh & Cave (C.C.) 29; 30 L. J. (M.C.) 142.

(4) Leigh & Cave (C.C.) at p. 17. See also the judgment of the same learned judge in *Reg. v. Tite*, Leigh & Cave (C.C.) at p. 33.

(5) 2 Moo. (C.C.) 257.

servant. But, if a man binds himself to get orders, or at any rate to get in the money outstanding upon the orders he may get, he is a servant pro tanto. In *Reg. v. Walker* (1), the prisoner had been treated as a debtor in respect of the sums embezzled.

Collins, in reply. In *Reg. v. Batty* (2) the prisoner was paid by wages and not by a commission.

ERLE, C.J. We are all of opinion that this conviction must be quashed. The facts stated fall within the cases cited by Mr. Collins, which decide that a person who is employed to get orders and receive money, but who is at liberty to get those orders and receive that money where and when he thinks proper, is not a clerk or servant within the meaning of the statute. The construction of the documents decides this case. Under the first agreement the prisoner was a servant; but under the second he was at liberty to dispose of his time in the way he thought best, and to get or to abstain from getting orders on any particular day as he might choose; and this state of things is inconsistent with the relation of master and servant.

Conviction quashed.

Attorney for prosecution: *Ed. Lewis*.

Attorneys for prisoner: *C. Lewis & Sons*.

THE QUEEN v. BARNES.

June 9.

Larceny—Indictment—Property.

The prisoner was sent by his fellow-workmen to their common employer, to get the wages due to all of them. He received the money in a lump sum, wrapped up in paper, with the names of the workmen and the sum due to each written inside:—

Held, that he received the money as the agent of his fellow-workmen, and not as the servant of the employer, and that, in an indictment against him for stealing it, the money was wrongly described as the property of the employer.

THE following case was stated by the recorder of Bolton:—

Robert Barnes was tried at the general quarter sessions for the borough of Bolton, holden on the 12th of April, 1866, on an

(1) *Dears. & B. (C.C.)* 600; 27 *L. J. (M.C.)* 207. (2) 2 *Moo. (C.C.)* 257.

1866
THE QUEEN
v.
BARNES.

indictment which charged him with stealing a sum of 13*l.* 6*s.*, the moneys of Reuben Smith and others. The evidence was as follows :—

Reuben Smith : On the 16th of December last the prisoner was a fellow-workman with me at Ormrod and Hardcastle's. The prisoner, myself, and two others worked in the same room. It had been our custom for one of us to go every fortnight to get the wages of the four from the cashier, and to pay over the amount due to each. We did this by turns. On the 16th of December last it was my turn to go for the wages. The wages due to me on that day came to about 5*l.* 0*s.* 6*d.*; I cannot speak to the pence. The prisoner asked me if he might fetch the wages this time. I said, "Yes; but you must fetch them again when it comes to your turn." He said he would. At twelve o'clock the prisoner went to get the wages. He did not come back, and never gave me my wages.

Cross-examined : We used to get the four men's wages in a lump, and pay them over in separate shares.

Thomas Unsworth : I worked in the same room with prisoner and Reuben Smith on the 16th of December last. My share of wages on that day was about 3*l.* 18*s.* On that day prisoner went for my wages. He never paid them to me.

Peter Critchley : I worked in the same room with the prisoner on the 16th of December last. On that day 4*l.* 8*s.* 11*d.* was due to me for wages. Prisoner went to get the wages; he has not paid me my share.

John Makin : I am cashier for Ormrod & Co. On the 16th of December last the prisoner came to me for his wages, and those of the other witnesses. The account of wages due to each was made out in my office, under my superintendence; but I cannot say exactly how much was due to each on the day in question. When the prisoner came to me, I believe I said, "Whose wages are you come for?" He answered, "No. 6, Sovereign." "No. 6" is the number of the room in which the prisoner and the others worked; and "Sovereign" is the name of the mill. I had the money in one sum wrapped up in a paper. Our custom was to wrap up the wages for each room in a separate paper, inside which was written the names of the parties to whom they were to be paid, and the

sum due to each; and this was done on the present occasion. On the 16th of December I handed the money to the prisoner, wrapped up in a paper in the usual way. The sum which I handed to the prisoner was 1*l.* 5*s.* 1*d.*; and it was made up of 5*s.* 1*d.* in copper, 10*l.* in silver, and 8*l.* in gold.

On this evidence it was objected by counsel for the defence, that the indictment could not be sustained, because the money alleged to have been stolen was not the property of the prosecutors, but that of their employers, Messrs. Ormrod & Co.; and I was of this opinion.

Counsel for the prosecution thereupon applied to have the indictment amended by alleging that the money in question was the property of Messrs. Ormrod & Co.; and I ordered the indictment to be amended accordingly, by inserting therein the words "Peter Ormrod and another," instead of the words "Reuben Smith and others."

Counsel for the prisoner did not address the jury or call witnesses; but he contended that the above evidence was not in point of law sufficient to warrant a conviction on the indictment as amended, either at common law or under the 24 & 25 Vict. c. 96, sec. 3. I then summed up the evidence; and the jury found the prisoner guilty: but, on the application of counsel for the prisoner, I reserved the above question for the opinion of this Court.

This case was argued on the 9th of June, 1866, before Erle, C.J., Martin, Bramwell and Channell, BB., and Shee, J.

No counsel appeared for the prisoner.

Sleigh, for the Crown. The property was originally laid in the men; but the indictment was amended by alleging that the money was the property of Messrs. Ormrod & Co., the masters.

[CHANNELL, B. As the record was amended, this Court has only to decide on the amended record.]

The broad principle is this: If a servant receives money from his master for a specific purpose, eo instanti that he tortiously appropriates it, it is larceny. The cases on this point are all collected in *Russell on Crimes*. (1)

[BRAMWELL, B. In all those cases the person to whom the

(1) Vol. ii. pp. 394, 395, 4th ed.

1866
THE QUEEN
v.
BARNES. money was to have been paid would have had a claim against the master; in this case the masters could have said, in answer to such a claim, that they had paid the prisoner, who was the workmen's own agent.]

The prisoner was the masters' agent, until the money reached its destination.

ERLE, C.J. The conviction must be quashed. The prisoner was the agent of the workmen; and by their authority the cashier, who was the masters' agent, gave him the money. As soon as he received it, it was the money of the workmen.

Conviction quashed.

Attorneys for the Crown: *Gregory & Rowcliffes.*

END OF TRINITY TERM.

CASES

DETERMINED BY THE

COURT FOR CROWN CASES RESERVED

IN

MICHAELMAS TERM, XXX VICTORIA.

THE QUEEN v. TOMLINSON.

1866
Nov. 10.

Perjury—Jurisdiction of Local Marine Board—17 & 18 Vict. c. 104, s. 241.

Wilful and corrupt false swearing before a local marine board lawfully constituted upon a matter material to an inquiry then being lawfully investigated by them in pursuance of the 17 & 18 Vict. c. 104, is perjury, and indictable as such.

THE following case was stated by Martin, B. :—

The prisoner was tried before me at the last Liverpool assizes, and convicted of perjury or indictable false swearing before a local marine board, held at Liverpool, under the alleged authority of the Merchant Shipping Act (17 & 18 Vict. c. 104).

The prisoner was proved to have committed wilful and corrupt false swearing before the board; but an objection was made by counsel on his behalf: first, that there was not sufficient legal evidence of the appointment and due constitution of the board before which the false evidence was given; and, secondly, that wilful and corrupt false swearing before a local marine board was neither perjury properly so called nor an indictable offence.

I overruled the objections, but stated that I would reserve the further consideration of them for the Court of Criminal Appeal.

The evidence as to the appointment and constitution of the board was as follows :—

John Thomas Towson :—I am the secretary to the Liverpool Local Marine Board. I was present on the 1st and 8th of May,

1866
THE QUEEN
v
TOMLINSON.

when meetings of the board were held. The assessor was Mr. Raffles, the stipendiary magistrate. Mr. James Smith was chairman. He was appointed by the Board of Trade. Mr. Henry Wood was also present. He was also appointed by the Board of Trade. Mr. Aaron Boyd and Mr. Edward Friend were also present. They were elected by the ship-owners of the port. All these five gentlemen were present at the investigation. The same persons had acted as members of the board upon previous occasions. Some of them had been occasions similar to the present. The meeting was held in consequence of a direction or order from the Board of Trade. This is the letter containing the direction or order :—

“M

Board of Trade, Whitehall.

1759

25th April, 1866.

Sir,—I am directed by the Board of Trade to transmit to you the enclosed letter from Messrs. Stewart & Douglas, and to request you to move the Liverpool Local Marine Board to be so good as to institute an investigation into the charges of drunkenness therein preferred against Mr. Henry Couche, late master of the barque *Phrenologist*.—I am, &c.,

(Signed)

W. D. Fane.

The Secretary, Local Marine Board, Liverpool.”

The letter of Messrs. Stewart & Douglas above referred to is as follows :—

“M

1640

Liverpool, 24th April, 1866.

362

My Lords,—We duly received your letter of the 19th instant, and beg to thank you for the same. Since then we have seen Mr. Tyndale, and, as directed by him, beg to request that your Lordships will be pleased to order an inquiry to be held into the conduct of Henry Couche, late master of our barque *Phrenologist*, during her late voyage from Liverpool to and from the West Coast of Africa, from the 21st of October, 1864, to the 18th of April, 1866, as we are and have been informed that he was, during such voyage, repeatedly unfit to command his vessel through drunkenness, and

disobeyed our written orders in managing the ship's affairs.—We have the honour to be, your Lordships' humble servants,

Stewart & Douglas.

The Lords of the Committee of Council for Trade, London.”

I have had frequent communications with Mr. Fane, the writer of the letter, upon similar subjects. I know that he is the assistant secretary of the marine department of the Board of Trade. I caused a summons to be issued to Henry Couche. This is the duplicate original summons :—

“To Henry Couche, late master of the British ship
Phrenologist, of Liverpool.

Whereas the Board of Trade has reason to believe that you, the said Henry Couche, are from misconduct unfit to discharge your duties : And whereas the local marine board of the port of Liverpool is, by the direction of the Board of Trade, about to institute an investigation under the provisions of section 241 of the Merchant Shipping Act, 1854, into such misconduct, the particulars whereof are set forth in the copy of the report hereunto annexed, upon which the said investigation is ordered : These are, therefore, to require you personally to be and appear on the first day of May, 1866, at 2 o'clock in the afternoon, at the Sailors' Home, Liverpool, before the said local marine board, to answer the said charge, bringing with you your certificate as master.

Given under my hand, this 26th day of April, in the year of our Lord 1866, at Liverpool aforesaid. For and on behalf of the said local marine board,

(Signed)

James Smith, Chairman.”

Mr. Couche attended before the board on the 1st of May, in pursuance of this summons. It was adjourned until the 8th, and resumed upon that day. Mr. Couche again attended.

The remainder of the evidence of this witness is immaterial to the present purpose.

Henry Murphy :—I am superintendent of the local marine board of Liverpool. I attended this inquiry in pursuance of my duty. The board hold their courts at the Sailors' Home, where they meet and hold their investigations. The secretary has an office there. I attended this inquiry on the 1st of May, and also on the 8th.

1866

THE QUEEN
v.
TOMLINSON.

1866
THE QUEEN
v.
TOMLINSON.

The same gentlemen had formed a court before. Their proceedings have been acted upon.

The remainder of this witness's evidence is immaterial to the present purpose.

William Patrickson :—I am a clerk in the Board of Trade. The document of the 25th of April is signed by Mr. Fane. He is an assistant secretary of the board.

The remainder of the evidence in the case is immaterial to the present purpose.

The counsel for the prosecution referred to the following sections of the 17 & 18 Vict. c. 104, viz. ss. 6, 14, 15, 110, 241, 242; and also to the 25 & 26 Vict. c. 63, s. 23.

I request the opinion of the Court of Criminal Appeal upon the following questions :—

First, was there legal evidence to go to the jury that the local marine board, which sat on the 1st and 8th of May as above mentioned, was duly and lawfully appointed and constituted? (1)

Secondly, is wilful and corrupt false swearing before a local marine board, duly and lawfully appointed and constituted, upon a matter material to an inquiry then being lawfully investigated by them, in pursuance of the statute, perjury properly so called; or, if not, is it an indictable offence?

This case was argued before Cockburn, C.J., Martin and Bramwell, BB., and Mellor and Montague Smith, JJ.

No counsel appeared for the prisoner.

Edward James, Q.C. (C. Russell with him), for the Crown. By the 17 & 18 Vict. c. 104, s. 241, "if the Board of Trade, or any local marine board, has reason to believe that any master or mate is from incompetency or misconduct unfit to discharge his duties, the Board of Trade may either institute an investigation, or may direct the local marine board at or nearest to the place at which it may be convenient for the parties and witnesses to attend to institute the same, and thereupon such persons as the Board of Trade may

(1) This question was not argued, suming that the Board was lawfully nor alluded to in the judgment. But constituted.
the Court affirmed the conviction, as-

appoint for the purpose, or, as the case may be, the local marine board, shall, with the assistance of a local stipendiary magistrate (if any), and, if there is no such magistrate, of a competent legal assistant to be appointed by the Board of Trade, conduct the investigation, and may summon the master or mate to appear, and shall give him full opportunity of making a defence, either in person or otherwise, and shall for the purpose of such investigation have all the powers given by the first part of this act to inspectors appointed by the Board of Trade, and may make such order with respect to the costs of such investigation as they may deem just, and shall on the conclusion of the investigation make a report upon the case to the Board of Trade." By s. 242 "the Board of Trade may suspend or cancel the certificate (whether of competency or service) of any master or mate in the following cases, that is to say, 1st, if, upon any investigation made in pursuance of the last preceding section, he is reported to be incompetent, or to have been guilty of any gross act of misconduct, drunkenness, or tyranny." By s. 15, "Every such inspector as aforesaid shall have the following powers (that is to say) . . . he may administer oaths, or may, in lieu of requiring or administering an oath, require every person examined by him to make and subscribe a declaration of the truth of the statements made by him in his examination." By the 25 & 26 Vict. c. 63, s. 23, "the following rules shall be observed with respect to the cancellation and suspension of certificates, that is to say, the power of cancelling or suspending the certificate of a master or mate by the 242nd section of the principal act (the 17 & 18 Vict. c. 104), conferred on the Board of Trade, shall (except in the case provided for by the fourth paragraph of the said section) vest in and be exercised by the local marine board, magistrates, naval court, admiralty court, or other court or tribunal by which the case is investigated or tried, and shall not in future vest in or be exercised by the Board of Trade." The effect of these enactments is that the investigation is a judicial proceeding in every sense of the term.

1866
THE QUEEN
v.
TOMLINSON.

COCKBURN, C.J. We are all agreed that an indictment for perjury will lie. The inquiry was before a tribunal invested with judicial powers, and enabled to inquire on oath, and pass a sentence

1866 affecting the status of the person accused. It would be highly
 THE QUEEN inconvenient if false swearing upon such an inquiry did not amount
 v. to perjury. It would be fatal to the person accused, if he were not
 TOMLINSON. to have protection against witnesses who came to swear falsely.

Conviction affirmed.

Attorneys for the Crown: *The Solicitor to the Customs, London ;
 and William Tyndall, Liverpool.*

Nov. 10.

THE QUEEN v. CLARK.

Jurisdiction of the Court for Crown Cases Reserved—17 & 18 Vict. c. 78, s. 1.

No case can be stated for the opinion of this Court except upon some question of law arising on the trial. Where, therefore, the prisoner had pleaded guilty, and the question asked was whether the prisoner's act as described in the depositions supported the indictment, the Court held that they had no jurisdiction to consider the case.

THE following case was stated by the chairman of quarter sessions for the county of Cambridge:—

At the general quarter sessions of the peace holden for the county of Cambridge, on the 6th of July, 1866, James Clark pleaded guilty to an indictment which charged him with having, on the 5th of April, 1866, at Longstowe, in the said county, committed a certain unlawful act, to wit, the throwing a stone at and upon a certain tender then being used upon a certain railway called "The Bedford and Cambridge Branch of the London and North Western Railway," whereby he, the said James Clark, endangered the safety of the persons then being in or upon such tender.

This indictment was framed under the 34th section of the 24 & 25 Vict. c. 100, which enacts that "whosoever, by any unlawful act, or by any wilful omission or neglect, shall endanger or cause to be endangered the safety of any person conveyed or being in or upon a railway, or shall aid or assist therein, shall be guilty of a misdemeanor."

It appeared by the depositions that the prisoner and three companions (all of them agricultural labourers), having previously been drinking together, were, on the evening of the 5th of April, standing

on the bridge on the Old North Road, which runs over the Bedford and Cambridge Railway; and, as a goods train was passing, the prisoner picked up a stone from the road, and threw, or dropped, it on the tender. The stone struck the tender, and then rebounded on the fireman, without, however, inflicting any injury.

The Court of quarter sessions entertained a doubt whether this act of the prisoner, *i.e.*, throwing or dropping a stone, was such an unlawful act as to bring it within the provision of s. 34, especially as the offence of throwing a stone is specifically provided for by the 33rd section of the act. Judgment was, therefore, postponed; and the prisoner was discharged, upon recognizances to appear when called upon.

The opinion of the Court of Criminal Appeal is requested whether the prisoner was rightly indicted.

This case was considered by Cockburn, C.J., Martin and Bramwell, BB., and Mellor and Montague Smith, JJ.

No counsel appeared on either side.

COCKBURN, C.J. In this case we have no jurisdiction. It was not a question arising on the trial; for the man pleaded guilty, and he must be taken to know the law. The power to state a case for the consideration of this Court only applies to questions of law which arise on the trial. (1)

(1) See the 11 & 12 Vict. c. 78, s. 1, by which it is enacted that "when any person shall have been convicted of any treason, felony, or misdemeanor before any Court of oyer and terminer or gaol delivery, or court of quarter sessions, the judge or commissioner,

or justices of the peace before whom the case shall have been tried, may, in his or their discretion, reserve *any question of law which shall have arisen on the trial* for the consideration of the justices of either bench and barons of the Exchequer."

1866

 THE QUEEN
 v.
 CLARK.

END OF MICHAELMAS TERM, 1866.

CASES
DETERMINED BY THE
COURT FOR CROWN CASES RESERVED

IN

HILARY TERM, XXX VICTORIA.

1867
Jan. 19.

THE QUEEN *v.* MARTIN.

False Pretences—Remoteness.

A conviction for obtaining a chattel by false pretences is good, although the chattel is not in existence at the time the pretence is made, provided the subsequent delivery of the chattel is directly connected with the false pretence.

Whether or not there is such a direct connection is a question for a jury.

THE following case was stated by the chairman of quarter sessions for the county of Warwick :—

The indictment charged the prisoner, in the first count, that by falsely representing to the prosecutor that he, the prisoner, was agent to the Steam Laundry Company, of which some of the leading men in Birmingham were at the head, and that, as such agent, he was desired by the company to procure a spring van for the use of the company, he did obtain a certain spring van of the prosecutor with intent to defraud; and, in the second count, that the prisoner did order a spring van to be made and built for the company, under the same false representations as in the first count.

The prosecutor, John Grindrod, stated that he is a wheelwright at Aston, nigh Birmingham; that on an early day of June last the prisoner Martin came to him, and said that he wanted a van for the Steam Laundry Company at Aston, of which he was the agent, and that the company comprised some of the leading men of Birmingham at the head of it. He inquired the price, and was told it would be 40*l.* for the van, and 3*l.* more for lettering, if it was to be

lettered. He said it must be done in a month; and, being told it could not be got ready in that time, he said, "Then you must do it as soon as you can." Nothing further passed between them; but, when the van was ready to receive the letters, the prosecutor went to the prisoner's office in Colmore Row, to inquire in what way the van was to be lettered. The prisoner was not within on that occasion, and the prosecutor did not see him; but he was furnished at the office with a paper which contained the inscription to be put upon the van in the prisoner's handwriting. On the 7th of July the prosecutor received a letter from the prisoner altogether countermanding the order for the van; but, the van being by that time completed, the prosecutor on the following Saturday, notwithstanding the countermand, delivered the van, in pursuance of the original order, at the steam laundry premises situated in Aston Park. On the Monday after the Saturday on which the van had been delivered, the prisoner himself brought it back again to the prosecutor's yard, telling him that he ought not to have sent it after he received his letter countermanding the order. To this the prosecutor replied that he should not know what to do with it—it would be a burthen and a loss to him—and that the prisoner must keep it. The prisoner then said, "If I do, you must take off five pounds;" and the prosecutor answered, "Not five pence." Prisoner added, "Then, if I keep it, you must put in some boards to carry the baskets of linen upon." The prosecutor assented. The prisoner then drove away with the van. A few days after, the boards were fitted to the van by the prosecutor's workmen, whom he sent for the purpose; and the prosecutor also received from the prisoner an old van to have some repairs done to it. The prosecutor further stated in his evidence that on a Saturday, about a fortnight or three weeks after the delivery of the van, he received a printed circular, informing him that a meeting of the prisoner's creditors was to take place at three o'clock on the following Monday, and inviting him to attend as a creditor. This he declined to do; but, in the forenoon of Monday previous to the meeting, he called upon the prisoner at his office in Colmore Row, and had an interview with him, when he said to him, "How came you to send a circular to me? I have nothing to do with you; it is the company I made the van for." To this the prisoner replied, "I am the company;

1867

THE QUEEN
v.
MARTIN.

1867

THE QUEEN

v.
MARTIN.

there is no other company but only me. You may call me rogue, thief, and villain. I know that I have done wrong." The prosecutor also proved that in the month of February he had seen an advertisement frequently repeated in the *Birmingham Daily Post* newspaper, giving notice of the establishment of a Steam Laundry Company in Aston Park, the prisoner being the agent and manager, with an office at No. 3, Colmore Row; and the prosecutor further stated that he supplied the van to the prisoner solely as agent of the company, and on the faith of his representation that the company consisted of the leading men in Birmingham. On cross-examination the prosecutor admitted that once before, after the appearance in February of the advertisement in the newspaper, the prisoner had called upon him, and given him a similar order for a van, under precisely similar circumstances, which order was subsequently countermanded before the work was much advanced, consequently it was not proceeded with. This took place some time in the spring. He also admitted that he had taken the prisoner's representation about the company, without inquiring who the leading men of Birmingham at the head of it were, and without requiring any reference; and that he knew the prisoner was proprietor of a theatre in Birmingham. He also admitted that in the interview between himself and the prisoner, after receiving the circular, the prisoner said to him, "Well, you have got the old van; and you will not be so badly off." Being asked what he considered the old van was worth, the prosecutor said he valued it at 25*l*.

Three other witnesses were examined on the part of the prosecution; but they only proved, 1st, the meeting of the creditors on Monday, the 13th of August, which resulted in a deed of composition, under which the prisoner paid 5*s*. in the pound; 2ndly, the publication in February of the advertisement in the newspaper by the prisoner's authority; 3rdly, the delivery of the van on the premises of the Steam Laundry Company in Aston Park.

Verdict: *Guilty*. Judgment respited until Epiphany sessions. The prisoner liberated on bail.

The question for the opinion of the Court of Criminal Appeal is, whether the verdict of *Guilty* is a right verdict upon the evidence.

This case was argued before Bovill, C.J., Willes, J., Channell, B., and Blackburn and Lush, JJ.

1867

THE QUEEN
v.
MARTIN.

Kennedy, for the prisoner. In order to support an indictment for obtaining by false pretences, the thing obtained must be in existence when the false pretence is made. A man cannot be indicted for obtaining by false pretences an agreement to make something. The old law contemplated the existence of something of which there could be an owner; and although now, by the 24 & 25 Vict. c. 96, s. 88, ownership need not be alleged, yet the nature of the thing to be obtained is not altered. Section 90 of that act applies to the case of valuable securities not in existence when the false pretence is made; but there is no offence in ordering a chattel to be made. A man cannot be convicted of obtaining a dog by false pretences, because a dog is not the subject of larceny: *Reg. v. Robinson*. (1) Neither is that the subject of larceny which is not in existence when the false pretence is made.

[WILLES, J. The law did not condescend to take notice of base animals. A dog was not the subject of larceny at common law, because, as it was said, a man shall not hang for a dog. (2)]

In *Douglass's Case* (3) it was held that money obtained from a servant cannot be described as the property of the master, because the master afterwards reimburses the servant. In *Wavell's Case* (4), where a man induced a banker to honour his cheques by false pretences, the conviction was held bad, because what was obtained was credit on account.

[BLACKBURN, J. There the prisoner never obtained the money at all. The question here is, whether the van, when built, was obtained by a continuing false pretence.]

The doctrine of a continuing pretence is not to be found in the statute. In *Gardner's Case* (5) the prisoner obtained a contract for lodging by false pretences, and afterwards obtained food under that contract; but it was held that the getting the food was too remotely the result of the false pretence. So here the false pretence was exhausted in obtaining the contract to build the van. *Bryan's Case* (6) is still more strongly in favour of the prisoner.

(1) Bell, C. C. 34; 28 L. J. (M.C.) 58.

(2) See 7 Rep. 18 a.

(3) 1 Camp. 212.

(4) 1 Moo. C. C. 224.

(5) Dears. & B. C. C. 40.

(6) 2 F. & F. 567.

1867

THE QUEEN
v.
MARTIN.

[LUSH, J. In *Gardner's Case* (1) the prisoner did not contemplate obtaining the food when he made the false pretence.

BLACKBURN, J. It is not everything obtained subsequently that is obtained by the false pretence. I should have said that even in *Gardner's Case* (1) the question of remoteness was one for the jury. Here, however, the delivery of the van was the very object and aim of the false pretence.]

No counsel appeared for the Crown.

BOVILL, C.J. The question asked of us is, whether the verdict was right upon the evidence. This we understand to mean whether there was evidence to go to the jury; and so understanding it, we are all of opinion that there was. The objection urged upon us has been answered by my Brothers Willes and Blackburn in the course of the case; and it is obvious that there are many cases within the mischief of the statute where the thing obtained is not in existence when the false pretence is made. Thus a man, by false pretences, may induce a tailor to make and send him a coat, or a friend to lend him money, which may consist of bank-notes not printed when the false pretence was made on which the loan was granted. So also a man might obtain coals which were not got, and therefore not a chattel in the eye of the law, at the time of making the pretence. It is absurd to say that the chattel obtained must be in existence when the pretence is made. The pretence must, indeed, precede the delivery of the thing obtained; but at what distance of time? What is the test? Surely this, that there must be a direct connection between the pretence and the delivery—that there must be a continuing pretence. Whether there is such a connection or not is a question for the jury. In *Gardner's Case* (1) the prisoner obtained, at first, lodgings only, and, after he had occupied the lodgings more than a week, he obtained board; and it was held that the false pretence was exhausted by the contract for lodging, the obtaining board not having apparently been in contemplation when the false pretence was made. It is true that in *Bryan's Case* (2) the contract was for board as well as lodging; but there the indictment was for having obtained sixpence as a loan some time after the contract

(1) Dears. & B. C. C. 40.

(2) 2 F. & F. 567.

for board and lodging had been entered into; and it is clear that the obtaining the loan was as remote from the false pretence under which the contract for board and lodging had been entered into, as the obtaining of the board was from the false pretence made in *Gardner's Case*. (1) In the present case, when the false pretence was made and the order given, it was never contemplated that the matter should rest there; and we have no difficulty in holding that there was a continuing pretence, and a delivery obtained thereby.

1867

THE QUEEN
v.
MARTIN.

WILLES, J. I will only add that, since the cases of *Reg. v. Abbot* (2) and *Reg. v. Burgon* (3), it is impossible to contend seriously that the case is not within the statute because the chattel is obtained under a contract induced by the false pretence.

Conviction affirmed.

Attorney for prisoner: *Walter, Birmingham.*

THE QUEEN v. LOWRIE.

Jan. 19.

Larceny—Valuable Security—24 & 25 Vict. c. 96, ss. 1, 27—Indictment.

An indictment under 24 & 25 Vict. c. 96, s. 27, for stealing a valuable security, must particularize the kind of valuable security stolen; and any material variance between the description in the indictment and the evidence, if not amended, will be fatal.

THE following case was stated by the chairman of quarter sessions for the county of Northumberland:—

David Lowrie was tried before me, at the last Michaelmas quarter sessions for Northumberland, upon an indictment which charged him with stealing "a certain valuable security—to wit, an agreement between the said David Lowrie and one William Cairns, whereby the said William Cairns was entitled to receive payment of certain sums of money, and which said sums of money were then due and unsatisfied to the said William Cairns, the said security being then and there the property of one John Mackintosh."

(1) Dears. & B. C. C. 40.

(2) 1 Den. C. C. 273.

(3) Dears. & B. C. C. 11.

1867
THE QUEEN
v.
LOWRIE.

One James Alexander had been tenant of a farm, William Cairns and John Alexander being sureties for his rent. James Alexander became bankrupt; and Cairns and John Alexander put the prisoner into the farm for the remaining year of the lease—namely, from May, 1865, to May, 1866—at a rent of 156*l*. The prisoner entered in May, 1865. The first half-year's rent was satisfied in November—Cairns said, by a distress. At the close of March, 1866, Cairns met the prisoner, by appointment, at his house; and one John Mackintosh, at their request, wrote upon a piece of paper bearing a penny stamp an agreement relative to the farm. Mackintosh gave evidence of what passed at this interview. He stated that he wrote down upon a piece of paper the terms agreed upon by Cairns and the prisoner, and read them over aloud. He then handed the paper to the prisoner to sign; and the latter, after signing it, handed it to Cairns; and by him it was re-delivered to Mackintosh to keep until May, or until the affairs were settled. This paper was what the prisoner was charged with afterwards stealing; and, as it was not forthcoming at the trial, although the prisoner had notice to produce it, secondary evidence of its contents was given. Mackintosh stated that he recollected a stipulation in it, that Cairns was to take the crop, and pay 50*l*. for it, and also a stipulation that Cairns was to pay a certain sum for some fixtures; but he did not recollect any relative to two sums of 28*l*. and 7*l*. being made payable to Cairns, instead of to the prisoner; and, on being asked in cross-examination, he said his belief was, that there was no such term in the agreement, although there might have been other things in. (It appeared in the course of the case that the prisoner had let a grass park to one Robert Stafford for 28*l*., payable on May 12th, and some stintage for 7*l*., payable on the same day.) Cairns stated that the terms contained in the paper were—1st, that he was to pay 50*l*. for the right to sow and reap the crop; 2nd, that the two sums above mentioned were to be received by him, and not by the prisoner; 3rd, that he undertook to pay the half-year's rent of 78*l*., due on May 12th, in return for the crop and the 28*l*. to be received from Robert Stafford. The stintage 7*l*. had to be accounted for, when the dilapidations were ascertained. He made no mention of any sum being payable for fixtures. Cairns paid the 78*l*. in June. Stafford stated

that he had agreed with the prisoner for the grass for 28*l.*, payable on May 12th (but that the prisoner got from him, on account, 24*l.* on the 14th of April, and the balance on May 18th), and that he had no notice of any agreement between Cairns and the prisoner affecting his bargain with the prisoner until considerably later than May 12th, and after the rent of 28*l.* had been paid by him to the prisoner. No further evidence than Cairns' was given about the 7*l.* for stintage. A few days after the drawing up of the agreement Cairns turned off the farm fifty or sixty head of cattle belonging to the above John Alexander, which were on his fallow quarter for turnips. On the 13th of April John Alexander and the prisoner called on Mackintosh; and Alexander asked to look at the agreement itself. Mackintosh produced it, and read it aloud to the two men; and then the prisoner took it out of his hand, and folded it up and put it in his pocket, saying he was going to shew it to Cairns; and he and Alexander walked away, after Mackintosh had again asked prisoner to return it to him. Mackintosh called on the prisoner the same evening; but he refused to give it up. Cairns said the prisoner had never offered to shew him the agreement, nor had he seen it since he had delivered it to Mackintosh. He also said, in cross-examination, that he had heard there was some arrangement between the prisoner and John Alexander about feeding the latter's cattle on the farm. He admitted that his solicitor had, on his instructions, commenced an action against the prisoner for the second half-year's rent, said to have been made the subject of the agreement, and that such proceedings were still pending. Criminal proceedings were not commenced till the month of August, when an information was laid by Cairns, upon the same day that his son was brought before the magistrates and fined, at the instance of the prisoner, for an assault upon him.

At the close of the above case for the prosecution, it was objected for the prisoner, by his counsel, that he could not be legally convicted upon the above indictment, because, 1st, The written paper alleged to have been stolen by him was not a valuable security within the 27th section of the 24 & 25 Vict. c. 96. 2nd, It was not a valuable security whereby Cairns was entitled to receive payment of certain sums of money, and which said sums of money were then due and unsatisfied to the said Cairns.

1867

THE QUEEN
v.
LOWRIE.

3rd, It was the prisoner's own property, to which he was entitled as part owner. 4th, The prisoner was joint bailor of it; and there was no evidence of a fraudulent intention against the bailee, in whom the property was laid in the indictment.

I, however, left the case to the jury, who convicted the prisoner; and I admitted him to bail, until the opinion of the Court for the consideration of Crown Cases Reserved could be obtained. The opinion of the Court is requested, whether, on proof of the above facts, the prisoner was legally convicted upon the above indictment? If the opinion of the Court should be in the affirmative, the conviction to be affirmed; if in the negative, to be quashed.

This case was argued before Bovill, C.J., Willes, J., Channell, B., and Blackburn and Lush, JJ.

Greenhow, for the prisoner. The indictment is framed under the 24 & 25 Vict. c. 96, s. 27, which makes the larceny of "any valuable security other than a document of title to lands" felony. The words "valuable security" are explained by s. 1 of the same act to include, among other things, any "warrant, order, or other security whatsoever, for money or for payment of money." The description given in the indictment was material, and was not proved; for the document was nothing more than an agreement between the prisoner and Cairns, and did not entitle the latter to receive the 28*l.* from Stafford, who was discharged by having paid the prisoner without notice of it. There was nothing more than an executory agreement, Cairns' right to receive the 28*l.* depending on his payment of the rent. (1)

[BLACKBURN, J. The document seems to be an equitable assignment of money when it became due.

LUSH, J. It was an agreement that Cairns should receive, and not an actual direction to Stafford to pay.]

T. C. Foster, for the prosecution. The description of the document, being laid under a *videlicet*, is immaterial, and may be

(1) He also contended that the agreement was not a valuable security within the meaning of the 24 & 25 Vict. c. 96, s. 1; that the prisoner was part owner of it, and as such could not be convicted of stealing it; and that there was no evidence of fraudulent intent. But, as no decision was given upon these points, this part of his argument is omitted.

struck out. The agreement was a document of title to goods within the meaning of the 24 & 25 Vict. c. 96, s. 1.

Greenhow was heard in reply.

1867

THE QUEEN
v.
LOWELL.

BOVILL, C.J. We are all of opinion that the description given in the indictment was necessary and material, because it is not every valuable security, but only such as is not included in the term "document of title to lands," that is within the 27th section of the Larceny Act. That description was not supported by the evidence. The document proved at the trial was an agreement by which Cairns was to sow and reap the crop, to pay the rent, and to receive 28*l.* from Stafford. No notice of this agreement was given to Stafford; and it was not of itself a document entitling Cairns to receive the money from Stafford. Moreover, the money was not due and unsatisfied at the time the prisoner took the agreement. The indictment describes a particular kind of security; and, as the evidence does not correspond with that description, the indictment cannot be sustained.

Conviction quashed.

Attorneys for prosecution: *Gray, Johnstone, & Mounsey, for Forster, Alnwick.*

Attorneys for prisoner: *Shum & Crossman, for Wilson & Middlemas, Alnwick.*

THE QUEEN v. GREENLAND.

Jan. 26.

Perjury—Banker's affidavit—9 Geo. 4, c. 23, s. 7.

The affidavit verifying the return of the issue by a banker of unstamped bills and notes under the 9 Geo. 4, c. 23, may be sworn, either before a justice of the peace under s. 7 of that statute, or before a commissioner to administer oaths in Chancery under the 55 Geo. 3, c. 184, s. 52, the later enactment being cumulative only.

The manager of a bank is a chief clerk within the meaning of the 9 Geo. 4, c. 23, s. 7, which requires such affidavit to be made by a cashier, accountant, or chief clerk.

THE following case was stated by Pigott, B:—

Edward Greenland was tried and convicted before me, at the Central Criminal Court, on the 25th day of October last, on an in-

1867
THE QUEEN
v.
GREENLAND.

dictment for perjury committed by him in an affidavit made in pursuance of the statute 9 Geo. 4, c. 23, entitled "An act to enable bankers in England to issue certain unstamped promissory notes and bills of exchange upon payment of a composition in lieu of the stamp duties thereon."

The facts were, that the prisoner, Edward Greenland, was for several years manager of the Leeds Banking Company (which was a registered joint-stock company) at a salary of 3000*l.* per annum. He had twelve clerks under him, over whom he had the control. He was not the accountant or cashier; but the cashiers took their orders from him. He directed the issues of notes, and signed them. His duties were those of general manager; and he made the affidavit in question on the 4th of July, 1864, before Mr. William Sykes Ward at Leeds (he being a commissioner to administer oaths in Chancery for the Leeds district). The affidavit is written on the back of a half-yearly return required under the 7th section of the statute 9 Geo. 4, c. 23. No director or proprietor of the bank joined in the affidavit, or made any other affidavit verifying the return. The half-yearly returns which had been made for the years 1860, 1861, 1862, 1863, and 1864, and received by the commissioners, were produced in evidence, and were respectively verified by the affidavit of the manager of the bank alone.

Mr. Serjeant Ballantine, for the prisoner, took the following objections in point of law: First, that the affidavit was not made before a person empowered to take it, but should have been made before a justice of the peace. Secondly, that the prisoner was not the proper person to make the affidavit, he not being a cashier, accountant, or chief clerk. Thirdly, that there should have been evidence that the commissioners of stamps expressly required the affidavit of a "cashier, accountant, or chief clerk," in addition to that of the persons empowered to issue bills and notes. (1)

I overruled these objections, and directed the jury that the prisoner was proved to be a chief clerk sufficiently for the purpose of the statute, and that the evidence, which shewed that the commissioners had for years received and acted upon the affidavit of the prisoner as manager or chief clerk, was sufficient to shew that they required an affidavit (if any requirement were necessary).

(1) The third objection was not argued.

The jury found the prisoner guilty.

If the Court should be of opinion that either of these objections is good in point of law, the prisoner is to be discharged from his recognizances: otherwise the verdict is to stand; and the prisoner will come up for sentence at the next Court.

1867

THE QUEEN
v.
GREENLAND.

This case was argued before Kelly, C.B., Willes, Keating, and Blackburn, JJ., and Pigott, B.

Giffard, Q.C. (Sleigh with him), for the prisoner. This indictment is framed under the 9 Geo. 4, c. 23, which, by s. 7, requires that persons to be licensed to issue or draw unstamped notes or bills under that act shall give security by bond to deliver to the commissioners of stamps half-yearly "a just and true account in writing, verified upon the oaths or affirmations (which any justice of the peace is hereby empowered to administer), to the best of the knowledge and belief of such person or persons, and of his or their cashier, accountant, or chief clerk, or of such of them as the said commissioners shall require, of the amount or value of all unstamped promissory notes and bills of exchange, issued," &c. The first objection is, that the affidavit in this case was not made before a justice of the peace in pursuance of that section, but before a commissioner to administer oaths in Chancery. By the 55 Geo. 3, c. 184, s. 52, "all affidavits and solemn affirmations in the case of quakers, required by this or any former or future act of parliament, or which shall be required by the said commissioners of stamps, to be made for the satisfaction of the said commissioners, of and concerning any facts or circumstances upon which they are to execute the powers vested in them by this or any other act, or for the verification of any accounts of or concerning the duties under their management, or for any other purpose relating to such duties, shall, in all cases not otherwise expressly provided for, be made before the said commissioners, or any one or more of them, or before a master in Chancery, ordinary or extraordinary, in England," &c. (1) But in this case it is "otherwise expressly provided" by the 9 Geo. 4, c. 23, s. 7, that the affidavit shall be made before a justice of the

(1) By the 16 & 17 Vict. c. 78, s. 1, "Commissioners to administer oaths in
"Masters Extraordinary in Chancery" Chancery."
are to be designated thenceforth as

1867
THE QUEEN
v.
GREENLAND.

peace. The 5 Geo. 3, c. 46, and the 44 Geo. 3, c. 98, s. 24, contain similar express provisions; and, whenever the legislature has intended that the powers given by the later act should be cumulative, and not in substitution for those given by the 55 Geo. 3, c. 184, it has expressly said so, as in the 4 & 5 Vict. c. 50, s. 2, which requires an affidavit or affirmation, and enacts that "such affidavit or affirmation shall be made before any justice of the peace in any part of the United Kingdom, or before a master extraordinary in Chancery, or any person authorized to take affidavits by any of the superior courts in England or Ireland."

Secondly, the prisoner was not the proper person to make the affidavit. The case finds that he was the manager, not the cashier, accountant, or chief clerk; and he discharged the duties of a principal, and not those of a clerk or servant.

Mellish, Q.C. (F. H. Lewis with him), for the Crown. As to the first objection, the 9 Geo. 4, c. 23, s. 7, contains only a permissive provision empowering a justice of the peace to administer the oath, and does not prevent persons expressly mentioned in the 55 Geo. 3, c. 184, from administering it also. The word "otherwise" must be construed to mean "to the contrary of what is herein enacted;" and, to render the one statute inconsistent with the other, the subsequent statute should not contain permissive, but compulsory words, as is the case with the 4 & 5 Vict. c. 50, s. 2. If the intention of the legislature is to be considered, it is more reasonable to suppose that a justice of the peace was added to the persons named in the previous statute for the sake of convenience, and that it was not intended to take away the power from those in superior authority. One affirmative statute does not repeal another affirmative statute.

Giffard, Q.C., was heard in reply.

KELLY, C.B. At first I entertained some difficulty in reconciling the imperative language of the 55 Geo. 3, c. 184, with the permissive language of the 9 Geo. 4, c. 23; but, on full consideration, I agree with my learned Brothers that, as these are both affirmative statutes, they are not inconsistent; and, if we read the statute 9 Geo. 4 as enacting that, whereas a statute had previously authorized certain qualified persons to administer oaths, a justice of the peace might also do so, then the statute 55 Geo. 3 remains

unrepealed. I entertain no doubt that the legislature intended the later provision to be cumulative and additional.

1867

THE QUEEN
v.
GREENLAND.

As to the second objection, both in a joint-stock and in a private bank, every one employed, whether he is called manager or secretary, in reality is nothing more than a clerk; and heads of the separate departments may properly be called chief clerks. The prisoner, although called manager, was still a chief clerk, and qualified to make the affidavit.

Conviction affirmed.

Attorneys for the Crown: *Jacobs & North, for North & Son, Leeds.*

Attorney for prisoner: *J. D. Marsden, for Richardson & Turner, Leeds.*

END OF HILARY TERM, 1867.

CASES
DETERMINED BY THE
COURT FOR CROWN CASES RESERVED
IN
EASTER TERM, XXX VICTORIA.

1867
May 11.

THE QUEEN *v.* BROWN AND HEDLEY.

Evidence—Witnesses—Impeaching Credit.

In order to impeach the character of a witness for veracity, witnesses may be called to prove that his general reputation is such that they would not believe him upon his oath.

THE following case was stated by the chairman of quarter sessions for the North Riding of Yorkshire :—

The defendants were indicted at the Easter quarter sessions of the peace for the North Riding of Yorkshire, for unlawfully and maliciously conspiring and agreeing together to assault and inflict grievous bodily harm on one John Francis Robinson. At the close of the case for the prosecution, the counsel for the defendants, after having called several witnesses to character, proposed to call witnesses to prove that they would not believe the witnesses for the prosecution on their oaths. The Court decided on refusing to receive such evidence. The defendants were found guilty, but were admitted to bail to appear at the next court of quarter sessions for the North Riding of Yorkshire, to receive judgment. At the request of the defendants' counsel, this case was granted by the Court for the opinion of the Court of Criminal Appeal, whether the evidence tendered by the defendants' counsel ought to have been received or not.

This case was heard before Kelly, C.B., Martin, B., and Byles, Keating, and Shee, JJ.

1867

THE QUEEN
v.
BROWN AND
HEDLEY.

Shepherd, for the prisoner, cited *Mawson v. Hartsink* (1), and was then stopped.

A. W. Simpson, for the Crown, submitted that the evidence offered was inconsistent with *Reg. v. Rowton* (2), and read a note from Taylor on Evidence (3) in which that learned author quotes the opinion of Shepley, J., in an American case of *Phillips v. Kingfield*. (4)

The Court, however, declined to hear any further argument on the subject, observing that all the text-writers were agreed that the evidence could be given, and that the practice was so ancient, and hitherto so undoubted, that it could not be altered now unless by the authority of the legislature.

Conviction quashed.

Attorneys for the prisoner: *De Gex & Harding*, for *Dobson*, *Middlesborough*.

Attorneys for the Crown: *R. M. & F. Lowe*, for *Trevor*, *Guisborough*.

THE QUEEN v. PROUD.

May 11.

Perjury—Jurisdiction of Justice—Master and Apprentice—4 Geo. 4, c. 34, s. 2.

The prisoner was indicted for perjury committed before a police magistrate upon a summons taken out by him as an apprentice against his master under the 4 Geo. 4, c. 34, s. 2, for non-payment of wages:—

Held, that the magistrate had jurisdiction to adjudicate upon the complaint, although the summons was not taken out until the relation of master and servant had ceased; and that, at any rate, he had jurisdiction to inquire into the existence of such relation.

THE following case was stated by the Recorder of London:—

On the 31st of January, 1867, the prisoner was tried before me at a session of the Central Criminal Court upon an indictment for perjury. The indictment alleged that on the 16th of January,

(1) 4 Esp. 102.

(3) Vol. ii. p. 1250, 4th ed.

(2) Leigh & Cave C. C. 520; 34

(4) 1 Applet. 375.

L. J. (M. C.) 57.

1867
THE QUEEN
v.
PROUD.

1867, at the Westminster police court, T. J. Arnold, Esq., one of the magistrates of the police courts of the metropolis, sitting at the Westminster police court, did duly hear a complaint then depending against one Charles Ginn for neglecting to pay his apprentice, the said William Proud, certain wages then due to him; and that, upon the hearing of the said complaint, the said William Proud falsely swore that, during the period between the 28th of October, 1865, and the 28th of April, 1866, he had not received any money from the said Charles Ginn; and that, during the period between the 28th of April, 1866, and the 28th of October, in the same year, he had received from the said Charles Ginn the sum of 2s. 6d. each week, and no more. In a second count, the perjury was alleged to be in falsely swearing on the said hearing that in the week next following the 28th of October, 1865, he had not received from the said Charles Ginn any money for wages; that the said Charles Ginn had not paid him 2s. 6d. for wages several times during the period between the 28th of October, 1865, and the 28th of April, 1866; and that the said Charles Ginn had not paid him 5s. several times for wages during the period between the 28th of April, 1866, and the 28th of October in the same year. It was proved in evidence by the said Charles Ginn that, on the 28th of October, 1865, the defendant, William Proud, entered the service of the said Charles Ginn (a hairdresser) under an indenture of apprenticeship for twelve months, with an arrangement that he was to be paid 2s. 6d. a week wages for the first six months, and 5s. a week wages for the last six months; and that on the 28th of October, 1866, having completed his service, he left the employment, and afterwards wrote a letter to the said Charles Ginn, stating that, while by his indenture he should have received 2s. 6d. a week during the first six months and 5s. a week during the last, he had received nothing during the first six months, and only 2s. 6d. a week during the last, and claiming 6l. as due to him.

The said Charles Ginn alleging that he had paid the defendant, and the latter denying it, the summons in question was issued and heard before Mr. Arnold, the magistrate, as alleged in the indictment. Witnesses were called on the trial in confirmation of the evidence of the said Charles Ginn; and the jury found the defendant guilty of perjury: but at the close of the case for the prosecu-

tion, Mr. Ribton, on behalf of the defendant, objected that the magistrate's jurisdiction under the 4 Geo. 4, c. 34, s. 2, with respect to differences and complaints between masters and apprentices, was gone when that relation ceased to exist, and that, therefore, he had no jurisdiction to hear or adjudicate upon this complaint. I held that he had jurisdiction under the said act, on the ground that this matter was a complaint, difference, or dispute which arose between a master and apprentice, within the meaning of the said act and the acts therein recited, touching wages due to such apprentice; but I agreed to reserve that question, and now accordingly state this case for the opinion of the justices of either bench and barons of the exchequer in the Court for the consideration of Crown Cases Reserved.

1867
THE QUEEN
v.
PROUD.

If the Court should think that the magistrate had not jurisdiction to hear the complaint, the conviction will be reversed; otherwise the defendant, who is in custody, will receive judgment.

This case was argued before Kelly, C.B., Martin, B., and Byles, Keating, and Shee, JJ.

J. Digby, for the prisoner. The police magistrate had no jurisdiction. The 4 Geo. 4, c. 34, s. 2, enacts that "all complaints, differences, and disputes which shall arise between *masters or mistresses and their apprentices*, within the meaning of the said before-recited acts, or any of them, touching or concerning any wages which may be due to such apprentices, shall and may be heard and determined by one or more justice or justices of the peace of the county or place *where such apprentices shall be employed*," &c. These words contemplate the continuance of the relation of master and apprentice; and, as in this case that relation had ceased, the police magistrate had no jurisdiction, and so the false swearing was *coram non judice*.

[MARTIN, B. According to your contention the magistrate would have no jurisdiction to enforce payment of the last week's wages in any case.

KELLY, C.B. If a magistrate had made an order on the master for payment of wages, and the apprenticeship ceased before a warrant could be issued, you must contend that the jurisdiction to issue the warrant would be gone.]

By the first section of the act the magistrate, upon the complaint

1867

THE QUEEN
v.
PROUD.

of the master, may abate the wages of the apprentice or commit him to the house of correction. If the jurisdiction does not cease with the apprenticeship, a master by delaying his complaint until the apprenticeship was over might deprive the magistrate of this option. The same observation applies to the 20 Geo. 2, c. 19, one of the previous acts, under which the apprentice may be discharged.

[MARTIN, B. The magistrate had at any rate jurisdiction to inquire whether the relation of master and apprentice existed.

KELLY, C.B. The apprentice himself set the magistrate in motion by his complaint.]

The act is a penal one and must be construed strictly.

No counsel appeared for the Crown.

KELLY, C.B. This conviction must be affirmed. The act in question is a remedial not a penal enactment; and in construing it we must look to the substance of its provisions. It enables a magistrate to determine disputes between masters and their apprentices about wages. In this case there was a dispute: the apprentice put the law in motion; and there was a determination. Is there anything in all that inconsistent with the statute? Our attention, however, is called to the words, "where such apprentice shall be employed." If those words refer to the time for adjudicating upon the complaint, the objection is well-grounded; but we think that they are merely descriptive of the justice, and do not refer to time at all, and that the magistrate in this case had authority to hear and determine the complaint. But, further, whether the magistrate had jurisdiction or not to proceed, he clearly had jurisdiction to inquire whether the relation of master and apprentice existed, with a view to proceeding to determine the dispute as to wages, if such a relation did exist. He could not divine that the relation of master and servant was at an end. He could only arrive at that fact by inquiry; and, if in the course of that inquiry perjury was committed, although it might turn out that the magistrate had no jurisdiction, yet successful perjury is not to go unpunished.

Conviction affirmed.

Attorney for prisoner: *W. D. Smyth.*

THE QUEEN v. SANDERS.

Resisting Apprehension—Warrant—11 & 12 Vict. c. 43, schedule (O. 1).

1867

May 4.

A magistrate's warrant of commitment upon a conviction for a penalty, following the form given in the 11 & 12 Vict. c. 43, schedule (O. 1), and addressed "to the constable of" A., can only be executed by the parish constable, and not by a county police constable stationed at A.

THE following case was stated by LUSH, J. :—

Abraham Sanders was convicted before me, at the last assizes for the county of Lincoln, of wounding John Harris, a police constable, in the execution of his duty, and with intent to resist his (the prisoner's) lawful apprehension.

The prisoner had been convicted of drunkenness and riotous behaviour at Gainsborough, and ordered to pay a fine of 5s., with 9s. 6d. costs, or to be imprisoned for seven days in the house of correction. The money not having been paid, a warrant was issued for his apprehension, directed to "the constable" of Gainsborough; this being the form given in the schedule (O. 1) to the 11 & 12 Vict. c. 43. This warrant was delivered to the superintendent of the police for that district, and by him handed over to John Harris, one of the police constables under him, to be executed. Harris, with the warrant in his possession, attempted to execute it, telling the prisoner he must either have him or his money. The prisoner refused to pay, and struck the officer, who was then endeavouring to prevent his escape. A friend of the prisoner, who was present, then offered to pay the amount; but the officer refused to take it, saying: "I shall take you now, money or no." He then seized the prisoner; and, in the attempt to resist apprehension, the latter inflicted the injury complained of. At the station, but not before, Harris charged the prisoner with the assault.

Two objections were made by the prisoner's counsel: 1st. That either the warrant was bad for not specifying which of the constables was to execute it, or it must be read as directed to the superintendent or the parish constable. 2ndly. That, as the constable at the time of the arrest did not tell the prisoner that he arrested him for the assault, but professed to act on the autho-

1867
THE QUEEN
v.
SANDERS.

riety of the warrant, he was not justified in detaining him after the tender of payment.

I overruled both objections, but reserved the points for the determination of the Court of Criminal Appeal.

This case was argued before Kelly, C.B., Martin, B., and Byles, Keating, and Shee, JJ.

Mellor, for the prisoner. The warrant was directed to the constable of Gainsborough, that is, to the parish constable; and the execution by the police constable was therefore illegal. *Freegard v. Barnes* (1) is precisely in point. [He was then stopped.]

Bristowe, for the Crown. The 2 & 3 Vict. c. 93, s. 8, gives to police constables all the powers which any constable has within his constable-wick. By virtue of that act, the police constable had become the "constable" of Gainsborough.

[KEATING, J. That act is anterior to the case of *Freegard v. Barnes*. (1)]

KELLY, C.B. If the warrant had been specially directed to the police constable, or generally to all other constables and peace officers of the division, the arrest would have been lawful; but, as it was directed to the "constable of Gainsborough," that is, the parish constable only, it could not lawfully be executed by any other person.

Conviction quashed.

Attorneys for prosecution: *T. H. & R. A. Oldman, for Oldman, Gainsborough.*

Attorney for prisoner: *W. S. Bladon, Gainsborough.*

(1) 7 Ex. 827.

THE QUEEN v. GREGORY.

1867

May 11.

Soliciting and Inciting to Commit a Felony—Accessory—24 & 25 Vict. c. 94, s. 2.

The offence of soliciting and inciting a man to commit a felony is, where no such felony is actually committed, a misdemeanor only, and not a felony under the 24 & 25 Vict. c. 94, s. 2, which only applies to cases where a felony is committed as the result of the counselling and procuring therein mentioned.

THE following case was stated by the Deputy Recorder of Leeds:—

James Gregory was tried and convicted before me at the quarter sessions for the borough of Leeds, held there on the 20th of April, 1867, upon an indictment, the material parts of which are as follows:—

“The jurors, &c., present that James Gregory, on the 9th of February, 1867, falsely, wickedly, and unlawfully, did solicit and incite one John White, a servant of one James Kirk, feloniously to steal, take, and carry away a large quantity, to wit, one bushel of barley, of the goods, &c., of Kirk, against the peace, &c.”

A second count in the same form alleged the offence to have been committed on the 12th of February. A third count alleged that the defendant wickedly and unlawfully did solicit and incite the said John White, and one Charles Evans, and one Charles Knapton, they being servants of Kirk, feloniously to steal a large quantity of barley, of the goods of the said Kirk, against the peace, &c. The indictment charging a misdemeanor, the jury were sworn accordingly. There was evidence upon all the counts of the indictment in proof of the offence charged; but no one of the three servants named stole any barley in compliance with the defendant's solicitations or otherwise.

It was objected by counsel for the defendant that the offence proved (no felony having been committed by reason of the defendant's solicitation and incitement) came under the provision of the 24 & 25 Vict. c. 94, s. 2, which makes it a felony to “counsel, procure, or command any other person to commit any felony, whether the same be a felony at common law or by virtue of any act passed or to be passed;” and that, although that section of the statute

1867
 THE QUEEN
 v.
 GREGORY.

apparently contemplated that a felony must be committed by reason of the counsel, procurement, or command, yet that the Court of King's Bench in the case of *Rex v. Higgins* (1), which was apparently the last case on the subject, held it not to be necessary that the felony should be committed by reason of the counsel or procurement, and that the solicitation to commit the offence was an act done towards the commission of the offence, which made it at that time *per se* the offence of misdemeanor, and that now the statute of Victoria changed the quality of the offence, and made it a felony. The offence therefore of incitement to commit a felony under the ruling of *Rex v. Higgins* (1), and under the 2nd section of the 24 & 25 Vict. c. 94, was now no longer a misdemeanor but a felony, and complete as a felony upon proof of the incitement alone. The indictment therefore not charging the incitement and solicitation of the prisoner to have been done "feloniously" was bad: *Reg. v. Gray*. (2)

I left the case to the jury, directing them in accordance with the decision in *Rex v. Higgins* (1) that the soliciting a servant to steal his master's goods is a misdemeanor, although it be not charged in the indictment that the servant stole the goods, or that any other act was done except the soliciting and inciting. I also directed them that in my opinion the 24 & 25 Vict. c. 94, s. 2, did not affect a case where there was no principal felon or principal felony; but at the urgent request of the defendant's counsel I reserved this case for the consideration of the justices of either bench and barons of the exchequer.

The question upon which the opinion of the Court for the consideration of Crown Cases Reserved is respectfully requested is, whether, since the passing of the 24 & 25 Vict. c. 94, it is a misdemeanor to solicit and incite a servant to steal his master's goods, though no other act be done except the soliciting and inciting?

This case was argued before Kelly, C.B., Martin, B., and Byles, Keating, and Shee, JJ.

C. Foster, for the prisoner. The conviction is wrong. Originally, no doubt, the offence was a misdemeanor; but the 24 & 25

(1) 2 East, 5.

(2) Leigh & Cave C. C. 365.

Vict. c. 94, has altered its quality, and it is now a felony. To solicit and incite is in fact to counsel and procure; and the prisoner was therefore within the 24 & 25 Vict. c. 94, and might have been convicted of the substantive felony of counselling and procuring White to commit a felony. Then, the offence having thus become a felony, no indictment will lie for it as a misdemeanor: *Rea v. Cross*. (1)

Waddy, for the Crown, was not called upon.

KELLY, C.B. The first question is, whether a soliciting and inciting is equivalent to a counselling and procuring, so that an allegation of the former would sustain a conviction upon a statute making the latter an offence. It is not necessary to decide that point now; but we must not be taken to hold that an indictment founded upon a statute could be sustained, if, instead of the words of the statute, it used other words which might have a different signification. The second question is, whether the soliciting and inciting, or, indeed, the counselling and procuring (if we may supply those words), a man to commit a felony, are within the 24 & 25 Vict. c. 94, so as to make the soliciting and inciting a felony, although no principal felony be committed. Looking at the structure of the section, and construing it by the ordinary rules of grammar, it is impossible to put that construction upon it. There can be no accessory to a felony, unless a felony has been committed. Here there was no principal felony; and, therefore, the prisoner's offence was a misdemeanor only, and he has been properly convicted.

Conviction affirmed.

Attorneys for the Crown: *Torr, Janeway, & Taggart, for Cranswick, Leeds.*

Attorney for prisoner: *Ferns, Leeds.*

(1) 1 Ld. Raym. 711.

END OF EASTER TERM.

CASES

DETERMINED BY THE

COURT FOR CROWN CASES RESERVED

IN

TRINITY TERM, XXX VICTORIA.

1867

THE QUEEN *v.* ROBINSON.

June 1.

Bankrupt—Feme Covert—Husband and Wife—Evidence—12 & 13 Vict. c. 106, s. 233.

A married woman having been adjudicated a bankrupt upon her own petition, in which she described herself as a widow, was afterwards convicted under the 24 & 25 Vict. c. 134, s. 221, of having embezzled her property:—

Held, that the conviction was wrong, as the property was her husband's.

Held also, by Kelly, C.B., Martin, B., and Shee, J., that examinations taken before a commissioner in bankruptcy are admissible as evidence against the persons examined upon a criminal charge.

THE following case was stated by Montague Smith, J.:—

Mary Robinson, John William Robinson, and John William Andrew (together with Mary Skirrow, who was acquitted), were tried before me at York at the spring assizes of 1867, and were convicted and sentenced to terms of imprisonment. Mary Robinson had been adjudicated a bankrupt on the 25th of July, 1866. The indictment contained sixteen counts. One set of counts charged Mary Robinson with committing misdemeanors under the Bankruptcy Act, 1861, sec. 221, par. 3, viz., by concealing and embezzling property, and the other defendants with aiding her. Another set of counts charged all the defendants with a conspiracy to do these acts. The bankrupt, Mary Robinson, had carried on the business of a pawnbroker in Hull on her own account as "Mrs. Robinson;" she was adjudicated a bankrupt on her own petition, in

which, and in the affidavit verifying it, she described herself as of 16, Great Passage Street, Hull, pawnbroker, widow. It was proved that Mary Robinson was at the time of contracting her debts and of her bankruptcy a married woman. Her maiden name was "May;" and she was married in 1844 to Robert Robinson, who at the time of the trial was still alive. About fourteen years ago the husband went abroad, and was absent for ten years; he returned about five years ago, and remained in England about a year and a half, during which time he occasionally stayed with the bankrupt at the house in Hull in which she lived and carried on her trade. About three years ago he went to America, and has not since been seen in England. The creditors were not aware that Mary Robinson was a married woman; and she told some of them she was a widow. The defendant John William Robinson is her son, and assisted her in carrying on the business. The *Gazette* of the 27th of July, 1866, containing the advertisement of adjudication, was put in evidence; and no step has been taken to dispute or annul the adjudication.

1867
THE QUEEN
v.
ROBINSON.

It was objected by the learned counsel on behalf of the several defendants, that the bankruptcy was null in consequence of the coverture of Mary Robinson, and that the defendants could not be convicted on any of the counts in the indictment. It was also objected for each of the other defendants that, if Mary Robinson was estopped from disputing her bankruptcy, they were not. I reserved these objections for the consideration of the Court for Crown Cases Reserved.

The three defendants were severally examined before the commissioner in bankruptcy, under the provisions of the Bankrupt Law Consolidation Act, 1849. Their evidence was taken down, and proved at the trial before me by a shorthand writer duly appointed under the same act. The defendants were each examined respecting the fraudulent disposition of the property which was the subject of the present indictment; and material evidence for the jury in support of the prosecution was obtained from each of the examinations. No caution was given to the defendants by the commissioner; and no objection was made by either of them to the examination, or to any of the questions put to them, on the ground that the answers might tend to criminate them.

1867

THE QUEEN
v.
ROBINSON.

It was objected on behalf of each of the prisoners that the statements in his and her examination were not admissible in evidence against them respectively upon this indictment. I admitted the evidence, but reserved these objections also for the consideration of the Court.

April 27. *Campbell Foster*, for the prisoners. The conviction in this case was wrong. Mary Robinson was a married woman; and so the adjudication in bankruptcy was a nullity. As a married woman she could not contract, except for necessities, and then only as agent for her husband. The whole of the debts for which she was made a bankrupt were contracted during coverture; and the fact of her husband having lived with her at the house where she was carrying on her trade, was evidence of an assent and ratification on his part. A *feme covert* cannot bring an action or be impleaded as a *feme sole*, while the relation of marriage subsists and she and her husband are living in this kingdom, notwithstanding she lives separately from her husband, and has a separate maintenance secured to her by deed: 1 Selw. N. P. 338. Nor does the fact of her having been made a bankrupt on her own petition estop her from setting up her coverture, for in *Davenport v. Nelson* (1) a woman who had declared herself to be a *feme sole*, and as such had executed deeds and maintained actions, when sued herself as a *feme sole* was held not to be estopped from setting up the defence of coverture. Even if the woman was estopped, the other defendants were not.

Secondly, the examination of a bankrupt should not be used against him on a criminal charge. It is true that this point appears to be concluded by the authority of *Reg. v. Scott* (2); but that case was not entirely satisfactory to the profession. (3)

[KELLY, C.B. We have no means of reviewing that decision. We are the same court; and the court of the fifteen judges is a court of the same jurisdiction, not a superior one.]

Hannay (*Coltman* with him), for the prosecution. It is submitted, first, that Mary Robinson is estopped; secondly, that, the statutory

(1) 4 Camp. 26.

(3) See, per Cockburn, C.J., *Reg. v.*(2) *Dears. & B. C. C. 47*; 25 L. J. (M.C.) 128.*Skeen*, Bell C. C. 97, 127; 28 L. J. (M.C.) 98.

period for disputing the bankruptcy having expired, the *Gazette* was conclusive evidence against her as to the fact of the bankruptcy; thirdly, that, if she is guilty, those who aided and assisted her are so also. There appears to be no case as to a married woman being estopped; but there are several as to infants, which will afford an analogy. In *Ex parte Bates* (1), where a bankrupt applied to annul the fiat on the ground of infancy, and it appeared that on the occasion of his marriage, a year before the fiat issued, he had made an affidavit that he was then of age, his petition was dismissed. So in *Goldie v. Gunston* (2), and in *Watson v. Wace* (3), where a man had obtained his discharge out of custody on the ground of his bankruptcy, he was held to be estopped from disputing the validity of the commission. *Ex parte Cutten* (4) is a similar case. In *Vaughan v. Vanderstegen* (5), where a married woman had concealed her marriage, and dealt with a tradesman as a single woman, he was held to be entitled to payment out of her separate property. In *Barrow v. Barrow* (6), Wood, V.C., says that there is abundant authority to shew that a court of equity can, and does, deal with the interests of married women, where there is an equity by which their consciences can be affected.

[KELLY, C.B. In this case there was no divorce, no separate trading under a particular custom, nothing to prevent the husband from coming back and dealing with the property. Could the Court of Bankruptcy deal with this property at all, especially as there are third parties interested in it? What would be the answer to an action brought by the husband in trespass or in trover?]

No question as to the ownership of the property has been reserved by the judge who tried the case. The question is, whether the bankruptcy is a nullity. It cannot be said that the proceedings are null and void *ab initio*, as the commissioner could only act on the information before him. The cases as to infants shew that the Court of Chancery will not treat an adjudication obtained by fraud as absolutely null. In *Poole v. Canning* (7), a married woman sued as a *feme sole* pleaded her coverture, but, no evidence

1867

THE QUEEN
v.
ROBINSON.

(1) 2 M. D. & De G. 337.

(2) 4 Camp. 381.

(3) 5 B. & C. 153.

(4) 1 Gl. & J. 317.

(5) 2 Drew. 408.

(6) 4 K. & J. at p. 419.

(7) Law Rep. 2 C. P. 241.

1867

THE QUEEN
v.
ROBINSON.

being offered at the trial in support of the plea, a verdict was found against her, and she was held not to be entitled to her discharge on being afterwards arrested on a ca. sa. Unless, therefore, she could obtain her discharge under the Bankruptcy Act, she must remain in prison.

Secondly, no proceedings were taken to annul the adjudication before the statutory period elapsed; and, by the 12 & 13 Vict. c. 106, s. 233, the *Gazette* then became conclusive evidence of the bankruptcy as against the bankrupt upon this prosecution: *Reg. v. Levi*. (1) Nor does it make any difference that the bankrupt is a woman. In *Ex parte West* (2) the 233rd section was held to apply in the case of an infant.

[KELLY, C.B. Have you any case under the criminal law, except that of *Reg. v. Levi*? (1) I think that that case makes it necessary for this Court to consider the validity of the adjudication.]

Thirdly, supposing that Mary Robinson is a bankrupt, and the charge is sustained against her, then the others who assisted her are guilty, as the word "maliciously" is not used in the statute, and therefore no *mens rea* is required. The 24 & 25 Vict. c. 94, s. 8, applies to accessories; so, the principal having committed a misdemeanor, by force of the statute the aiders become misdemeanants also.

Cur. adv. vult.

June 1. The following judgments were delivered:

KELLY, C.B. In this case Mary Robinson, together with John William Robinson and John William Andrew, has been convicted of embezzling and conspiring to embezzle certain property, laid to be the property of Mary Robinson (who is alleged to have become bankrupt), both before and after the adjudication in bankruptcy, with intent to defraud her creditors. The three defendants had been compulsorily examined, and without any caution given, before the commissioner in bankruptcy, under the provisions of the Bankruptcy Act, 1849; and it was objected that these examinations,

(1) Leigh & Cave, C. C. 597; 34 L. J. (M.C.) 174.

(2) 22 L. J. (Bank.) 71.

having been thus taken, were not admissible in evidence against them in a criminal prosecution. But *Reg. v. Scott* (1) is conclusive to shew that this evidence was admissible. I cannot but think that that decision is at variance with the principle of law, that no man is bound to criminate himself; but it was a decision of this Court, and has since been recognised in another case, *Reg. v. Skeen* (2); and we are not at liberty to question the authority of those decisions here.

It was also objected that the defendant Mary Robinson, at the time of the adjudication in bankruptcy and the commission of the offences charged, was a married woman, and so not liable to be made a bankrupt. To this it was answered, that, having represented herself as a widow, and traded as such, and her husband having been absent from England three or four years, she had become liable to the bankrupt law. But I am of opinion that, having been, in fact, a married woman at the time in question, the property with which she had traded was the property of her husband, and that she was not within the operation of the statutes of bankruptcy. It has been held that the wife of a *felon convict*, or a *feme covert*, who is a sole trader by the custom of London, is liable to be made bankrupt; but in this case the husband of Mary Robinson might return to England at any moment, and seize the property of which she was possessed and with which she had traded, and exercise his marital rights over it as he might think proper. But it was further objected that, Mary Robinson not having disputed the adjudication in bankruptcy within the time limited by the 12 & 13 Vict. c. 106, s. 233, the *Gazette* became conclusive evidence of the adjudication, and dispensed with any further proof in support of it. This objection, however, does not apply to the other two defendants; and, the prosecutors having failed to prove the allegations in the indictment necessary to support a valid adjudication, I am of opinion that, as against them, the adjudication was void, and the conviction must be quashed. It was urged for the prosecution that the adjudication must be held good until annulled or set aside by the Lord Chancellor or the Court of Bankruptcy; but this is altogether a mistake. An adju-

1867

THE QUEEN
v.
ROBINSON.

(1) Dears. & B. C. C. 47; 25 L. J. (M.C.) 128.

(2) Bell, C. C. 97; 28 L. J. (M.C.) 98.

1867
THE QUEEN
v.
ROBINSON.

dication in bankruptcy is of no force or effect whatsoever as evidence in any suit or proceeding, civil or criminal, unless supported by proof of all the acts and requisites essential to its validity, except when it is made conclusive evidence against particular classes of persons, or under particular circumstances, by the express provisions of an act of parliament, as by the 12 & 13 Vict. c. 106, ss. 233, 234. Were it otherwise, if the husband of Mary Robinson were to return to England and take possession, as he lawfully might, of the goods which passed as the property of the wife to the hands of her assignees, he might be indicted and convicted under an indictment in the form of that which is now before the Court, for embezzling, or conspiring to embezzle, his own property. It is not necessary that the adjudication should be annulled by any court of law or equity. The defendants James W. Robinson and John William Andrew could not be heard in any suit to set it aside. As against them it is merely void; and, indeed, the indictment is framed accordingly, for it contains allegations in every count, not merely of the adjudication itself, but of the petition and the trading by Mary Robinson and all other matters essential to its validity; and these were material allegations which the prosecutors were bound to prove. Having failed to do so, the conviction cannot be sustained.

With respect, however, to Mary Robinson, I should have been of opinion that she also was well entitled, in this criminal proceeding, to dispute the validity of the adjudication against her; and that, although it may be expedient and just to hold an adjudication in bankruptcy binding upon the bankrupt who fails to dispute it within a reasonable time, it cannot have been intended by the legislature to subject a man, perhaps a wholly innocent man, to the pains and penalties of a crime, by reason of his omission to dispute a bankruptcy within a period of two or three months, which may have been caused by mere inadvertence, or absence, or sickness, or poverty, or the mistake or negligence of an attorney. But upon this point also the objection is supported by a decision of this Court in the case of *Reg. v. Levi* (1); and by that decision we are bound. Although, however, the defendant Mary Robinson is thus precluded from denying that she has become bankrupt, it

(1) *Leigh & Cave*, C. C. 597; 34 L. J. (M.C.) 174.

1867

THE QUEEN
v.
ROBINSON.

is still open to her to contend that the indictment cannot be supported, inasmuch as in every count it is alleged that the property embezzled is her property; whereas, upon the facts proved, it is clear that the property was the property of her husband; and this allegation goes to the very essence of the offence, and is not capable of being made good by any amendment; for the property, if described according to the truth, must have been laid to have been the property of the husband of Mary Robinson; and, if so laid, no offence whatever under the statute would be charged in the indictment. And the learned judge having reported that the objection was made, that the defendants could not be convicted on any of the counts in the indictment, I am of opinion that the conviction as to all three of the defendants is bad, and must be quashed.

MARTIN, B. I also am of opinion that this indictment fails. It fails as soon as it is shewn that Mary Robinson was a married woman. The charge is laid under paragraphs 3 and 11 of the 221st section of the Bankruptcy Act, 1861. In my judgment, that section was introduced into the act in defence of the assignees and creditors of the bankrupt; and, when it is established that the supposed bankrupt is a married woman, then it is clear that her property is the property of her husband, and that her assignees are deprived of nothing; and therefore the indictment which lays the property as her property fails. With respect to the two cases of *Reg. v. Scott* (1), and *Reg. v. Levi* (2), which have been commented on, in my judgment they were rightly decided; and I must say that, when a point has once been distinctly raised and decided in a reported case, I for my part regret to find such a decision criticised and disputed over again. When a point has once been clearly decided, I think it is far better to acquiesce in the decision, unless it can be brought for review before a higher Court. In *Reg. v. Levi* (2) the Court held that the advertisement in the *London Gazette* was conclusive against the bankrupt in criminal as well as civil cases. Now here I do not say that the adjudication, being against a married woman, was absolutely void. To hold that it was so

(1) Dears. & B. C. C. 47; 25 L. J. (M.C.) 128.

(2) Leigh & Cave, C. C. 597; 34 L. J. (M.C.) 174.

1867

THE QUEEN
v.
ROBINSON.

would involve very serious consequences, as in that case every person *bonâ fide* acting upon it and dealing with the property, would be liable to be treated as a trespasser. The indictment, however, fails in substance, because it alleges that the property which Mary Robinson and the others are charged with embezzling is the property of Mary Robinson; and, as soon as it is shewn that Mary Robinson is a married woman, that allegation is disproved.

BYLES, J. I agree with the Lord Chief Baron that the prisoners are entitled to their discharge; but I desire to express no opinion on the questions—first, whether a married woman under these circumstances could be made a bankrupt; or, secondly, whether, having been adjudged a bankrupt, she is not a bankrupt within the meaning of the statute by reason of the interpretation clause in the act of 1861; or, thirdly, whether she or her co-defendants were bound by any estoppel; or, lastly, whether the examinations were admissible against any of them. The ground on which I rest my judgment is, that the goods were from the first, and, notwithstanding the bankruptcy, valid or invalid, still remained the property of the husband, and that he, at the time of the bankruptcy, was not merely in the situation of a person having a title to the goods though out of possession, but of one who, having a title to the goods, was also in actual possession; for it appears to me that on no supposition could the goods be the property of the bankrupt or of her assignees, and thus that they were at the time of the bankruptcy not only the property of the husband, but in his possession by reason of the possession of his wife.

KEATING, J. I am also of opinion that this conviction cannot be sustained; but I prefer to rest my judgment upon the ground stated by my Brother Byles.

SHEE, J. I also think the conviction, as to all three of the defendants, bad. Mary Robinson, having, before the commission by her of the alleged offence, been adjudicated a bankrupt, and having taken no steps to dispute or annul the bankruptcy, was, in my opinion, by the express enactment of the 229th section of the

24 & 25 Vict. c. 134 (the interpretation clause), a bankrupt. Of the fact that she was a bankrupt, the production of the *Gazette* of the 27th of February, 1866, was, as decided in *Reg. v. Levi* (1), on s. 233 of the 12 & 13 Vict. c. 106, conclusive evidence. Although Mrs. Robinson was a *feme covert*, I should have thought it very clear that, if she had after her adjudication been committed as a bankrupt to prison, and her gaoler had suffered her to escape, he would have been liable under the 12 & 13 Vict. c. 106, s. 274, to the forfeiture thereby enacted; and I see no good reason for doubting that she might have been convicted of several of the misdemeanors which are declared to be such by the 221st section of the 24 & 25 Vict. c. 134. She is charged, however, in all the counts of this indictment, with having embezzled, concealed, or otherwise unlawfully dealt with *her* property; and the other defendants are charged with having aided her in so doing. In order to support those charges, it was necessary to prove that the property in question was the property of her, Mary Robinson. The proof was that it was the property of Robert Robinson; and on that ground I agree with my Lord Chief Baron and the other members of the Court, that the conviction was bad, and must, as to all the defendants, be quashed. This objection to the conviction is not technical, but substantial. The law of husband and wife, as respects the dealings of a wife with third persons, is but a branch of the law of agency. There was some evidence in this case, that the wife carried on her trade with the knowledge and authority of her husband. Her dealings might probably have been held to be his dealings; and the property which was called hers in the Court of Bankruptcy certainly belonged to him. In taking steps to vest it in assignees, under the provisions of the Bankruptcy Act, without his authority, she did what was, as respects him, and probably also as respects some of her creditors, wrong; and it is quite consistent with the facts of the case, as reported to us, that, on better information, she desired to retrace her steps and preserve the property in question to be disposed of by its true owner. It is enough, however, to decide this point on the ground that a material allegation in all the counts of the indictment, the allegation that the property was her property, was dis-

1867

THE QUEEN
v.
ROBINSON.

(1) Leigh & Cave, C. C. 597; 34 L. J. (M.C.) 174.

1867
THE QUEEN
v.
ROBINSON.

proved by the evidence which has been reported to us. As respects the point of the admissibility of the examinations, it has been decided in *Reg. v. Scott* (1), that the maxim that no man shall be compelled to criminate himself, has, in the case of the examination of bankrupts and others in bankruptcy, been annulled by the Bankrupt Acts.

Conviction quashed.

Attorneys for the Crown: *Redpath & Holdsworth, for Shackles & Birks, Hull.*

Attorney for prisoner: *Chester, Hull.*

1867
June 1.

THE QUEEN v. MORRIS.

Autrefois Convict—Assault—24 & 25 Vict. c. 100, s. 45.

A conviction for assault by justices in petty sessions, at the instance of the person assaulted, and imprisonment consequent thereon, are not, either at common law or under the 24 & 25 Vict. c. 100, s. 45, a bar to an indictment for manslaughter of the person assaulted, should he subsequently die from the effects of the assault (Kelly, C.B., dissenting).

THE following case was stated by Pigott, B.:—

Thomas Morris was tried before me at the Stafford spring assizes upon an indictment for the manslaughter of Timothy Lymer, by inflicting bodily injuries on him on the 25th of June. It was proved in evidence that the prisoner had been summoned before the magistrates at the instance of the said Timothy Lymer for the assaults which caused the death, and was convicted and sentenced to imprisonment with hard labour. He underwent that punishment. Timothy Lymer died on the first of September from the injuries resulting from the above-mentioned assaults. It was contended, under s. 45 of the 24 & 25 Vict. c. 100, that the conviction for the assaults afforded a defence to the present indictment for manslaughter: see *Reg. v. Elrington*. (2) There was a substantial question raised by the evidence, whether the manslaughter was the result of injuries inflicted by the prisoner Morris

(1) Dears. & B. C. C. 47; 25 L. J. (M.C.) 128.

(2) 1 B. & S. 688; 31 L. J. (M. C.) 14.

or another prisoner Gibbons joined in the present indictment, and whether they were acting in concert. I thought it desirable to let the prisoner Morris have the benefit of either of the defences, and for that purpose to let the questions of fact go to the jury upon the plea of not guilty, and to reserve the question of law under the aforesaid section 45 for the opinion of this Court. The prisoner Gibbons was acquitted; and the prisoner Morris was convicted.

1867

THE QUEEN
v.
MORRIS.

If the Court should be of opinion that a conviction for the assault at the instance of the injured person, under section 45, affords a defence in law to an indictment for manslaughter resulting from that assault, then a plea of not guilty to be entered; otherwise the prisoner Morris to be called up for judgment at the next assizes.

April 27. *G. Brown*, for the prisoner. The conviction for the assault was a bar to this indictment. The cause was always the same within the meaning of the 24 & 25 Vict. c. 100, s. 45, which enacts that, if any person against whom a complaint of assault shall have been made by or on behalf of the party aggrieved, having been convicted, shall have suffered the imprisonment awarded, "he shall be released from all further or other proceedings, civil or criminal, for the same cause." The nature and quality might have been changed; but it could not be made a different cause by an event which happened six months afterwards. In *Reg. v. Eldrington* (1), it was held that where, under the 9 Geo. 4, c. 31, ss. 27—29, a complaint of assault had been made to two justices, who dismissed the complaint and gave the accused a certificate, the certificate might be pleaded in bar to an indictment founded on the same facts, charging assault and battery accompanied by malicious cutting and wounding so as to cause grievous bodily harm. In *Reg. v. Walker* (2), a plea of *autrefois convict* of an assault before justices under the 9 Geo. 4, c. 31, was held to be a bar to an indictment for felonious stabbing in the same transaction. Again, in *Reg. v. Stanton* (3), a conviction and imprisonment for assault were held to bar a subsequent indictment in respect of

(1) 1 B. & S. 688; 31 L. J. (M.C.) 14.

(2) 2 Mood. & Rob. 446.

(3) 5 Cox Crim. C. 324.

1867
 THE QUEEN
 v.
 MORRIS.

the same transaction charging an assault and wounding with intent to murder.

No counsel appeared for the prosecution.

Cur. adv. vult.

June 1. The following judgments were delivered:—

KELLY, C.B. In this case I have the misfortune to differ from my learned Brethren, who are of opinion that the conviction ought to be affirmed. The prisoner was charged before magistrates with an assault under the 24 & 25 Vict. c. 100, at the instance of the party aggrieved and now deceased, Timothy Lymer, and was convicted and sentenced to imprisonment with hard labour, and has undergone that sentence. The assault, the unlawful act with which he was charged, is the same assault and one and the same act as that which caused the death of Lymer, and of which he has been convicted under the present indictment. I think, therefore, that the case comes within the precise words of s. 45 of the 24 & 25 Vict. c. 100, which provides that in such a case "he shall be released from all further or other proceedings, civil or criminal, for the same cause." It is true that the offence is now charged in other language, and that, which before the magistrates was described as an assault, is now described as manslaughter: but it is one and the same act; and the cause of the prosecution before the magistrates and the cause of this prosecution are one and the same cause. The case, therefore, comes within the letter as well as the spirit of the act of parliament; and I think that to sustain this conviction would be directly to violate the maxim or principle of the law, "Nemo debet bis vexari" (here we might say "puniri") "pro eâdem causâ." Cases may indeed be suggested in which there might be a failure of justice, as where an assault has been treated lightly by a magistrate, and upon conviction a slight sentence passed, and yet from the subsequent death of the party assaulted the offence amounted to murder. But such a case must be rare and exceptional; and I think we ought to presume that the magistrates will in all cases under this or any other act of parliament do their duty. And as, where the charge is made at the instance of the party aggrieved, it may also be presumed that the whole of the evidence would be fully brought before the magis-

trates, and, upon conviction, an adequate punishment inflicted accordingly, I do not think that it was the intention of the legislature, or consistent with natural justice, that the accident of the subsequent death of the party should subject the accused to a repetition of the trial and the punishment. *Salvi's Case* (1) is clearly distinguishable. There the prisoner was indicted for the murder of one Robertson, and pleaded a plea of *autrefois acquit*, the acquittal having been upon an indictment for wounding with intent to kill. It was clear that this acquittal might have been pronounced upon the ground of the jury having negatived the intent to kill, and yet that the prisoner might well be guilty of the murder, without an intent to kill the individual murdered; as if he had shot at another man but unintentionally killed Robertson. The plea, therefore, of *autrefois acquit* was in that case properly over-ruled. Here, however, the prisoner has been tried, convicted, and punished for the very same offence in all its parts, though under another name, as that for which he is now indicted and again convicted; and it seems to me that to allow this conviction to stand is to punish a man twice for the very same cause, in violation of the before-mentioned maxim and of the express language of the act of parliament. I think, therefore, that the conviction ought to be quashed.

1867

 THE QUEEN
 v.
 MORRIS.

MARTIN, B. I am of opinion that this conviction ought to be sustained. The facts are, that the prisoner Morris, having assaulted Lymer, was brought before justices in the lifetime of Lymer, and imprisoned for the assault. Lymer afterwards dying of the injuries inflicted on him by Morris in this assault, Morris is indicted for manslaughter; and the question arises, whether the imprisonment by the justices for the assault is any answer to the indictment for manslaughter. I think that it is not. The question turns entirely upon the meaning of the words "for the same cause" in the 45th section of the 24 & 25 Vict. c. 100. I agree with the Lord Chief Baron, that the case of *Reg. v. Salvi* (1) has no bearing upon the question, though at the same time I am of opinion that the decision come to in that case by the late Chief Baron and Mr.

(1) This case is to be found in the Criminal Court, published by the Corporation of London, vol. 46, p. 884.

1867
THE QUEEN
v.
MORRIS.

Justice Willes and myself was correct. Here, however, the question is, what was the "cause" upon which the magistrates adjudicated? The word "cause" seems to me to be used in the 45th section synonymously with the words "accusation" or "charge." Now the charge before the magistrates was the assault; and that is not the same charge as is contained in this indictment. I am therefore of opinion that the present conviction is right. I would observe that to hold otherwise would be a most serious matter, because this enactment in the 45th section frees the defendant "from all further or other proceedings, *civil* or criminal." If, therefore, the Lord Chief Baron's judgment were to prevail, the widow of the deceased (assuming there to be such a person) would be deprived of her right to bring an action against Morris for causing her husband's death under Lord Campbell's Act, which otherwise she would be entitled to bring. It is clear to me that the words "same cause" mean the cause on which the justices adjudicated; and that cause was the assault. The imprisonment that the prisoner has undergone for the assault is, therefore, no defence to the present indictment.

BYLES, J. I am of opinion that the prior conviction of the assault under the 24 & 25 Vict. c. 100, s. 45, affords no defence to the subsequent indictment for manslaughter, the death of the deceased having occurred after the conviction, but being a consequence of the assault. The form and the intention of the common law pleas of *autrefois convict* and *autrefois acquit* shew that they apply only where there has been a former judicial decision on the same accusation in substance, and where the question in dispute has been already decided. There has, in the present case, been no judicial decision on the same accusation; and the whole question now in dispute could not have been decided, for, at the time of the hearing before the magistrates, whether the assault would amount to culpable homicide or not depended on the then future contingency whether it would cause death. The case of *Reg. v. Salvi* (1) argued before the Lord Chief Baron Pollock and my Brothers Martin and Willes, if not precisely in point, is nevertheless a strong authority for this view of the law. But reliance is placed on the words of the

(1) Central Crim. Court, Sess. Pap. vol. 46, p. 884.

statute (24 & 25 Vict. c. 100, s. 45), "for the same *cause*." It is to be observed that that statute does not say for the same *act*, but for the same *cause*. The word "*cause*" may undoubtedly mean "*act*:" but it is ambiguous; and it may also, and perhaps with greater propriety, be held to mean "*cause for the accusation*." The cause for the present indictment comprehends more than the cause in the former summons before the magistrates, for it comprehends the death of the party assaulted. It is, therefore, at least in one sense, not the same cause. But, if these observations on the meaning of the word "*cause*" as used in the statute should appear to savour too much of refinement, and to be used in support of a forced construction, it must be remembered that it is a sound rule to construe a statute in conformity with the common law, rather than against it, except where or so far as the statute is plainly intended to alter the course of the common law. An additional reason in this case for following the common law is the mischief which would result from a different construction. My Brother Martin has already illustrated the mischief in civil cases by a reference to Lord Campbell's Act. In criminal cases the mischiefs might be much greater; a murderer, for example, by suffering or obtaining a previous conviction for an assault, might escape the due punishment of his crime.

My Brother Keating (1) desires me to say that he concurs with me in this judgment.

SHEE, J. I am also of opinion that the conviction was right, on the grounds stated by my learned Brothers.

Conviction affirmed.

Attorneys for the prisoner: *E. & A. Tennant, Hanley.*

(1) Keating, J., had left the Court.

END OF TRINITY TERM, 1867.

CASES

DETERMINED BY THE

COURT FOR CROWN CASES RESERVED

IN

MICHAELMAS TERM, XXXI VICTORIA.

1867
Nov. 16.

THE QUEEN v. JARVIS.

Evidence—Confession, Admissibility of.

The prisoner was called up by his master, and told: "You are in the presence of two police officers; and I should advise you that to any question that may be put to you you will answer truthfully, so that, if you have committed a fault, you may not add to it by stating what is untrue." The master afterwards added: "Take care; we know more than you think." The prisoner thereupon made a statement:—

Held, that such statement was admissible against him on his trial for larceny.

THE following case was stated by the Recorder of London:—

At a session of the Central Criminal Court, held on the 8th of July, 1867, and following days, Frank Jarvis, Richard Bulkley, and Wilford Bulkley, were tried before me on an indictment, for feloniously stealing 138 yards of silk and other property of William Leaf and others, the masters of Jarvis. There was a second count in the indictment for feloniously receiving the same goods. William Laidler Leaf was examined, and said: The prisoner Jarvis was in my employ. On the 13th of May we called him up, when the officers were there, into our private counting house. I said to him, "Jarvis, I think it is right that I should tell you that, besides being in the presence of my brother and myself, you are in the presence of two officers of the police; and I should advise you that to any question that may be put to you you will answer truthfully, so that, if you have committed a

fault, you may not add to it by stating what is untrue." I produced a letter to him, which he said he had not written; and I then said, "Take care, Jarvis; we know more than you think we know." I do not believe I said to him, "You had better tell the truth."

1867
THE QUEEN
v.
JARVIS.

Counsel for the prisoner Jarvis objected to any statement of his made after the above was said being received in evidence, and referred to *R. v. Williams* (1), *Reg. v. Warringham* (2), *Reg. v. Garner* (3), *R. v. Shepherd* (4), and *Reg. v. Millen* (5).

Counsel for the prosecution referred to *Reg. v. Baldry* (6), *Reg. v. Sleeman* (7), and *Reg. v. Parker*. (8) I decided that the statement was admissible.

The jury found Jarvis guilty, adding that they so found upon his own confession, but they thought that confession prompted by the inquiries put to him. They acquitted the other two. At the request of counsel for Jarvis I reserved for the Court for the consideration of Crown Cases Reserved the question,—Whether I ought to have admitted the statements of the prisoner in evidence against him?

Coleridge, Q.C. (Straight with him), for the prisoner. In the case of *Reg. v. Baldry* (6), all the cases with reference to the admissibility of confessions are reviewed. The principles arrived at in that case were, first, that a confession must be free and voluntary, and that the onus of shewing this lies on the prosecution; secondly, that any inducement or threat of a temporal kind prevents the confession from being free or voluntary; thirdly, that it is immaterial what impression the person who made use of the inducement or threat intended to convey. The ground for not receiving such evidence is, that it would not be safe to receive a statement made under any influence, whether of hope or fear. If in this case the words had been, "You had better answer truthfully," there would have been no doubt about the inadmissibility of the statement; and yet the words actually used are substantially the same. It is

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| (1) 2 Den. C. C. 433. | (5) 3 Cox's Crim. Cas. 507. |
| (2) 15 Jur. 318; 2 Den. C. C. 447, | (6) 2 Den. C. C. 430. |
| note. | (7) Deara. C. C. 249. |
| (3) 1 Den. C. C. 329. | (8) Leigh & Cave, C. C. 42. |
| (4) 7 C. & P. 579. | |

1867
THE QUEEN
v.
JARVIS.

playing with language, considering the position of the parties, to say there was no inducement. It was equivalent to saying, "I should advise you to say what is better for you;" or, in other words, "You had better tell the truth." The law cannot measure the extent of the influence used, if any has been used and exercised on the mind. *Reg. v. Baldry* (1) is not in point, as the expression there made use of clearly did not amount to any promise or threat to induce the prisoner to confess. In *Reg. v. Garner* (2), a confession made by a girl, after being told by a medical man, in the presence of her mistress and master, that it would be better for her to speak the truth, was held inadmissible. In *R. v. Williams* (3), where the words used were ambiguous, and might be considered as a threat, it was held that the evidence ought not to be given. In *R. v. Shepherd* (4), a constable who apprehended the prisoner asked him what he had done with the tap he had stolen, and said, "You had better not add a lie to the crime of theft." The prisoner thereupon made a confession, which was held to be inadmissible. Again, in *Reg. v. Warringham* (5), Parke, B., says, that the onus lies on the prosecution to shew that the confession was not obtained from the prisoner by improper means. The jury have expressly found in this case that they thought the confession was prompted by the inquiries put. If to prompt means to instigate, to induce, and so to draw the confession from the prisoner, it is not voluntary, and cannot be received.

H. Giffard, Q.C. (*Grain* with him), for the Crown, was not called upon.

KELLY, C.B. While it is our duty to watch with a jealous caution the rules of law as to inducements to confess, for the sake of public justice we must not allow consideration for prisoners to interfere with the rules or decisions of courts of law. In this case, do the words fairly considered import either a threat of evil or a promise of good? They are these: "Jarvis, I think it is right that I should tell you that, besides being in the presence of my brother and myself, you are in the presence of two officers of the police; and I should advise you that to any question that may be put to

(1) 2 Den. C. C. 430.

(2) 1 Den. C. C. 329.

(3) 3 Russ. on Crimes, 4th ed. 377.

(4) 7 C. & P. 579.

(5) 2 Den. C. C. 447, note.

you you will answer truthfully." Pausing at these words, they would seem to operate as a warning rather than a threat, as advice given by a master to a servant. What follows?—"So that, if you have committed a fault, you may not add to it by stating what is untrue." These words appear to have been added on moral grounds alone; there was no inducement of advantage. Under these circumstances, putting no strain one way or the other, the words amount only to this: "We put certain questions to you; I advise you to answer truthfully, only that you may not add a fault to an offence committed, if any has been committed." With reference to the last words, "Take care; we know more than you think we know"—these amount only to a caution. The words, "You had better tell the truth," seem to have acquired a sort of technical meaning importing either a threat or a benefit; but they were not used in this case. The words that have been used import only advice on moral grounds.

1867

THE QUEEN
v.
JARVIS.

WILLES, J. The case would have been different, if it had appeared that the words used were, "It is better for you to tell the truth."

BRAMWELL, B., and BYLES and LUSH, JJ., concurred.

Conviction affirmed.

Attorneys for the Crown: *Humphreys & Morgan.*

Attorneys for prisoner: *Wontner & Son.*

THE QUEEN v. RYLAND.

Nov. 23.

Parent—Neglect to Provide for Infant—Indictment.

The prisoner was convicted on an indictment which charged him with neglecting to provide food and clothing for his child, but omitted specifically to allege his ability to do so:—

Held, that the ability to provide was implied, and therefore sufficiently averred, in the use of the word "neglect."

THE following case was stated by the Chairman of Quarter Sessions for the county of Surrey:—

At the general quarter session of the peace holden at Guildford

1867
THE QUEEN
v.
RYLAND.

in and for the county of Surrey, on Tuesday, the 2nd of July, 1867, Henry Blucher Ryland was tried and convicted upon the following count of an indictment:—

“The jurors for our Lady the Queen, upon their oath, present that, before the time of committing of the offence hereinafter in this count mentioned, Henry Blucher Ryland was the father of a certain male child of tender age, to wit, of the age of seven years, called and known by the name of Frederick George Ryland, and that Hannah Ryland, before the time of the committing the offence, and during all the time hereinafter in this count mentioned, was the wife of the said Henry Blucher Ryland, and as such wife living with the said Henry Blucher Ryland, and during all that time the said child was living under the care and control of the said Henry Blucher Ryland and the said Hannah Ryland, and during all that time it was the duty of the said Henry Blucher Ryland and the said Hannah Ryland to provide for, give, and administer to the said child wholesome and sufficient meat, drink, food, and clothing, for the sustenance, support, nourishment, and healthful preservation of the said child, the said child, by reason of his tender age, being then wholly incapable of providing for himself. And the jurors aforesaid, upon their oath aforesaid, do further present that the said Henry Blucher Ryland and the said Hannah Ryland, on the fifth day of March, in the year of our Lord One thousand eight hundred and sixty-seven, and on divers other days and times between that day and the day of the taking of this inquisition, and whilst the said child was of such tender age as aforesaid and wholly incapable of providing for himself as aforesaid, unlawfully and contrary to the said duty of the said Henry Blucher Ryland and the said Hannah Ryland in that behalf, did omit, neglect, and refuse to provide for, give, and administer to the said child clothing, meat, drink, and food, in any sufficient quantity for the sustenance, support, nourishment, and healthful preservation of the said child, by means whereof the said male child became and was weak and ill and greatly disordered and debilitated in his body, to the great damage of the said child, and against the peace of our said Lady the Queen, her crown, and dignity.”

After the jury were sworn and the defendant given in charge to them, his counsel objected that the indictment was bad, as it did

not allege that the defendant had the means of providing his child with wholesome and sufficient meat, drink, food, and clothing, for the sustenance, support, nourishment, and healthful preservation of the said child. It was replied that such allegation was unnecessary in the indictment, and that it was sufficient to prove such ability at the trial; but that, even if such allegation were necessary, the objection was too late, as, being for a formal defect apparent on the face of the indictment, it ought to have been taken by demurrer before the jury were sworn, as provided for by 14 & 15 Vict. c. 100, s. 25. The Court overruled the objection, and, proof having been given of the ability of the said Henry Blucher Ryland to provide the necessary food and clothing for his child, left the case to the jury, who found the said Henry Blucher Ryland guilty; but the Court reserved the two points above mentioned for the determination of the Court for the consideration of Crown Cases Reserved, viz. :—

1st. Whether an allegation of the ability of the said Henry Blucher Ryland to provide the necessary food and clothing for his child was requisite in the indictment?

And 2ndly. Whether the objection to the indictment was not too late?

J. Thompson, for the defendant. As to the point that the objection to the indictment was taken too late, the 14 & 15 Vict. c. 100, s. 25, only applies to formal defects. This is a substantial, not a formal, defect.

[WILLES, J. There can be nothing in this point; it is as much as to say that there never can be a motion in arrest of judgment.]

As to the first point, the indictment ought to have alleged that the defendant had the means of supporting the child. In *Reg. v. Chandler* (1) the indictment alleged that the defendant had the means; but there was no evidence to support the allegation, and the conviction was quashed. In this case evidence was given that the defendant had the means; but there was no allegation that he had in the indictment. It was material for the defendant to know that evidence of ability was going to be given; and he may have been prejudiced in his defence by the absence of a proper aver-

(1) Dears. C. C. 453; 24 L. J. (M.C.) 109.

1867

THE QUEEN.
v.
RYLAND.

1867
THE QUEEN
v.
RYLAND.

ment of that fact. In *Reg. v. Vann* (1) it was held that, if a parent has not the means of burying his child, though by remaining unburied it becomes a nuisance to the neighbourhood, he cannot be indicted, for he is not bound to incur a debt.

[KELLY, C.B. Although there is no substantive allegation of the defendant's ability to provide for his child, is it not involved in the language of the indictment, namely, that the defendants wholly neglected to perform that duty?]

Lilley, for the crown. This indictment shews an offence on the face of it. It is the duty of every parent to support his child; and a neglect of that duty constitutes an offence. Proof of ability was given at the trial. It was want of such proof which was fatal to the conviction in *Reg. v. Chandler*. (2) That proof having been given here, the offence was proved. In *Reg. v. Mabbett* (3) it was held that, if parents have not the means of providing proper food for their infant children, it is their duty to apply for the assistance provided by the poor laws; and that, if they wilfully neglect to do so, and such neglect causes death, they are guilty of manslaughter.

[WILLES, J. In *Reg. v. Pelham* (4), which was an indictment for ill-treatment of a lunatic, it was alleged that the defendant had the means for the comfortable support and maintenance of both, and that thereupon it became her duty to take proper care of him.]

J. Thompson, in reply. In *Reg. v. Hogan* (5) the indictment alleged that the prisoner abandoned and deserted her bastard child without providing any means for its support, intending to burthen the parish with its maintenance, and it was held to be bad, because there was no averment that the prisoner had the means of supporting the child.

KELLY, C.B. The majority of the Court (6) are of opinion that the word "neglect" in the indictment sufficiently alleges the special matter of the ability to provide.

Conviction affirmed.

Attorneys for the Crown: *Shaen & Roscoe*.

Attorney for defendant: *J. R. Mayo*.

(1) 2 Den. C. C. 325; 21 L. J. (M.C.) 39.

(4) 8 Q. B. 959.

(5) 2 Den. C. C. 277.

(2) Dears. C. C. 453; 24 L. J. (M.C.) 109.

(6) Kelly, C.B., Willes, J., Bramwell, B., Byles and Lush, JJ.

(3) 5 Cox. Crim. Cas. 339.

THE QUEEN v. ELWORTHY.

Evidence—Notice to Produce.

1867

Nov. 23.

The prisoner, a solicitor, was indicted for perjury in having sworn that there was no draft of a certain statutory declaration made by a client. No notice to produce the draft had been given to the prisoner; and upon his trial, it was proved to have been last seen in his possession. Secondary evidence having been given of its contents:—

Held, that, in the absence of such notice, secondary evidence was inadmissible.

THE following case was stated by Willes, J.:—

Elworthy was tried for perjury before me at the Old Bailey. The perjury was alleged to have been committed at the trial of Thomas Cannon for making a false statutory declaration. The assignment of perjury relied upon was in a statement made by Elworthy that there was no draft of that statutory declaration.

It appeared that Elworthy was one of a firm of attorneys who were employed to lend money for a client. They were applied to by Cannon for a loan, which they agreed, on behalf of their client, to make upon the security of some property belonging to Mrs. Cannon, and also of a newspaper in which Mr. Cannon was interested. Elworthy's firm required of Cannon, as a condition of the loan, a statutory declaration, which he made, and which stated, amongst other things, that he was the registered proprietor of the newspaper unencumbered. This declaration he made and signed; and, it being untrue, he was indicted for making a false declaration. Upon the trial of that indictment, Elworthy was called as a witness against Cannon; and, upon his cross-examination, with a view to excuse or palliate the falsehood of the statutory declaration, it was sought on behalf of Cannon to prove that there was a draft of the statutory declaration, that Cannon had seen it and corrected it, and that the statutory declaration which he in fact made had been improperly drawn, not shewing the corrections so made in the draft, and had been incautiously adopted by Cannon upon Elworthy assuring him it was all right. Upon that cross-examination, Elworthy denied that there had been a draft of the statutory declaration; and he explained a passage in his depositions in which a draft was referred to as a mistake for a draft of the assignment by way of security for the loan, in which there

1867
 THE QUEEN
 v.
 ELWORTHY.

were corrections. At the trial of Elworthy before me it was alleged for the prosecution that his statement at the trial of Cannon that there was not such a draft of the statutory declaration was false, and that in making such statement he had committed perjury. No notice to produce had been given, nor was there any subpoena duces tecum to the prisoner's partner to produce the alleged draft; and the prisoner's counsel objected that secondary evidence could not be given thereof. I allowed the case to proceed, and secondary evidence to be given, subject to the opinion of this Court as to the propriety of that course. The prosecution thereupon gave the evidence of Mr. and Mrs. Cannon, that there was a draft, and that it had originally been in the form of the statutory declaration, and had been altered in the alleged particulars by Cannon to the knowledge of Elworthy. The materiality of the existence of a draft turned upon its form and the fact of its having been so altered.

The prisoner was convicted; and, as I doubt the propriety of receiving secondary evidence under the above circumstances, I request the opinion of the Court upon that point whether the conviction was right.

Nov. 16. *Carter*, for the prisoner, was stopped by the Court.

Besley, for the Crown. There was evidence that this draft was left by Cannon with the defendant; and there was also the deposition containing the defendant's statement that there was no such document. It was not necessary to subpoena the prisoner's partner to produce the draft, because it was last left with the defendant.

[BRAMWELL, B. Notice to produce the draft would amount to notice to plead guilty, the existence of the draft being, in reality, the subject matter of the indictment.]

It was immaterial in whose hands the draft was. The prosecutor was entitled to identify it (1); and for that purpose no notice was requisite. The defendant was sent for trial for swearing that no such document existed; and that very document was last seen in his own hands. In *Aickle's Case* (2) Mr. Justice Heath said: "I do not think that this rule is so general as to have no exception. If the bill had been in the custody of the prisoner, there

(1) 1 Tayl. Ev. 4th ed. ss. 378, 379.

(2) 1 Leach 297 (note a). See also page 300 (note a.)

would have been no necessity to prove that it was not in existence; but parol testimony might undoubtedly in such case have been given of its contents." This ruling was unanimously supported by the twelve Judges. In *Colling v. Treweek* (1) Bayley, J., says: "Where, from the nature of the suit, the opposite party must know that he is charged with the possession of the instrument, notice to produce such instrument is unnecessary."

1867

THE QUEEN
v.
ELWORTHY.

Cur. adv. vult.

Nov. 23. KELLY, C.B. This was a trial for perjury, the perjury being assigned on a statement made by the defendant that there was no draft of a certain statutory declaration; and the question arose whether, in order to give secondary evidence of the contents of that draft, it was necessary to give notice to produce it to the defendant, into whose possession it was alleged to have come. I am of opinion that such notice was necessary. It is very important to conform to the rules of law, which protect the accused from the admission of evidence of a doubtful and uncertain character, when certain evidence can be obtained. Here the perjury assigned was, that there was no draft of the statutory declaration. In the course of the trial the exact contents of that draft became essential, because on them depended the materiality of the perjury assigned; and the prosecution proceeded to give evidence that such a draft existed and was in the defendant's hands, and then to give secondary evidence of its contents without having given any notice to produce it, on the principle that in this case notice might be dispensed with. Now, to take first of all the example of a civil action, it has been held that, in an action in trover for a deed or other writing, notice may be dispensed with, on the ground that the action itself is notice to the defendant of the nature and contents of the document. That doctrine is inapplicable here. Secondly, in a criminal prosecution for stealing a document, it has been held unnecessary to give notice to produce. In *Aickle's Case* (2) it is said: "If it had been in the prisoner's possession, the next best evidence to the bill itself would have been admissible; for, as a prisoner cannot be compelled, or even legally required, to

(1) 6 B. & C. 394, 398, 399; 1 Tayl. Ev. 4th ed. s. 422, page 432.

(2) 1 Leach, 294, 299.

1867
THE QUEEN
v.
ELWORTHY.

produce any evidence which may operate against himself, the next best evidence which it is in the power of the prosecutor to produce is always admitted." But there is also another reason that by the form of the indictment the prisoner has notice that he is charged with the possession of the very document, and will be required to produce it. This reason is inapplicable in this case. The defendant swore there was no draft; and there was nothing on the face of the indictment to shew that the draft necessarily came into his possession, or remained in it, so as to entitle the prosecution to say that he ought to have produced it. It was necessary to prove that the defendant swore there was no draft, that he knew that to be false, and that the perjury was material to the issue; and he might in reality have alluded to another document. This, therefore, is different from the other cases where this principle alluded to has been applied; and under these circumstances there is nothing to call upon us to apply it here. I think for myself that the principle of admitting evidence which is not the best evidence ought not to be extended.

WILLES, J. If I had seen at the time the course which the evidence afterwards took, I believe I should have acted on the principle laid down by the Lord Chief Baron; but I did not know the case would go to the jury so much on the alterations and contents as on the existence of the draft.

BRAMWELL, B. If the question had been only as to the existence of the draft, it might have been different; but here the prosecution gave evidence of the alterations and contents in order to shew wilful perjury. These contents therefore became material; and the general rule then applied that you must give the best evidence. The exception suggested is, that the indictment itself was notice; but that exception does not apply here, as the prosecution might have contented themselves with proving the existence of the draft and no more; whereas they did, in fact, give evidence of the contents.

BYLES and LUSH, JJ., concurred.

Conviction quashed.

Attorney for the Crown: *J. Beard.*

Attorney for defendant: *Elworthy.*

THE QUEEN v. TYSON.

Perjury—Materiality.

1867

Nov. 23.

Upon the trial of one Sullivan for robbery, the prisoner, in support of an alibi, swore, first, that Sullivan was in a certain house at the time of the robbery; secondly, that Sullivan had lived in that house for the last two years; and, thirdly, that he had never been absent from it more than two or three nights together during that time. In fact Sullivan had been confined in prison during one out of those two years:—

Held, that the second and third allegations were material as tending to render more credible the truth of the first, and that the prisoner was rightly convicted of perjury assigned upon them.

THE following case was stated by the Recorder of London:—

At a session of the Central Criminal Court, held on the 10th of June, 1867, and following days, Thomas Tyson was tried before me on an indictment for perjury. It was alleged in the indictment, and appeared in evidence, that at the May session of the Central Criminal Court, one Owen Sullivan was tried for a robbery, and that upon that trial Tyson was called as a witness on behalf of Sullivan. (1) The indictment went on to allege that, upon the

(1) The following is a copy of the judge's notes of the evidence given upon Sullivan's trial:—

William Pearce, of 12, Windsor Terrace, saith: On the 13th of April, at 8.45 P.M., I was in the Dover Road going to the train. I was passing Leicester House, and felt a man seize me and pull me round. I looked up, and saw the man's face; and two others laid hold of me, and pinioned my arms, rifled my pockets, and took away my watch, a sovereign, and 27s. in silver; and then they all ran away; and I fell down. I caught the man's eyes, and am sure the prisoner is the man. I got up, ran after them to the corner of Kent Street, and lost sight of them. On the following Tuesday I saw prisoner and five others; and I at once picked him out. He said, "I was not there; it was Bandy and some other." I said, "I know there were two others."

Cross-examined: I am positive I could not swallow anything for a fortnight, my throat was so pinched. I looked up at the man's face. I never saw him before. I did not see the faces of the others.

William Eldred, police constable, 160 M., saith: I took prisoner at the Red Lion, Suffolk Street, and took him to the station. Prosecutor picked prisoner out from six others at once.

Cross-examined: I told him I had a man in custody.

Mr. Cooper addressed the jury for prisoner, and called

Thomas Tyson, who saith: I am under deputy at 20, Mint Street, Borough—a lodging house. I remember prisoner being taken up. On the Saturday before prisoner came in between eight and nine, and did not go out again. He came in about 8.30; he lay down on a form till 9.45, and

1867
THE QUEEN
v.
TYSON.

trial of Sullivan, it was material to ascertain whether Sullivan was or was not at a house numbered 20 in Mint Street, in the borough of Southwark, on the evening of the 13th of April, 1867, between the hours of 8 o'clock and 10 o'clock, and whether Sullivan had lived at the same house for two years then last past, or from March, 1865, to March, 1866, and that Tyson falsely swore as such witness, 1st, that on the 13th day of April, 1867, Sullivan came to 20, Mint Street, at half past 8 in the evening, and did not go out again that evening; 2nd, that Sullivan had lived in the said house for two years then last past; and 3rd, that during the whole of that time Sullivan had never been absent from the same house for more than three nights together. Perjury was assigned upon each of the above allegations; and the prisoner was convicted on the last two. The second and third allegations were distinctly contradicted by the oaths of two warders of the Wandsworth House of Correction, who proved that Sullivan was under their charge in that House of Correction from March, 1865, to March, 1866. The prisoner was undefended; and a question was raised whether the averments of the prisoner were material on the trial of Sullivan. Counsel for the prosecution contended that they affected Tyson's credit as a witness on Sullivan's trial. I reserved the question for the consideration of the Court, whether the two last allegations of Tyson, upon which perjury was assigned, were sufficiently material on the trial of Sullivan to support the indictment for perjury in respect of them.

then went to bed. He has lodged at the house nearly two years.

Cross-examined: I know it was 8.30, because the prisoner is such a man for larking. The deputy was there at the time; he is not here.

Re-examined: He makes the kitchen merry. Another man followed him. The deputy sent the prisoner away from the fire.

By me: I went to the house in May, 1865. Prisoner lodged there from the time I went, and never was absent more than a night or two or three at most at a time. I went out of the

kitchen into the room where the clock is to see the time. I do not know why.

Richard Kemp saith: I am a warder at the House of Correction at Wandsworth. Prisoner was in Wandsworth Prison from March, 1865, to March, 1866.

A certificate of the conviction of Sullivan for robbery was produced. It was dated March, 1865. He was sentenced to twelve calendar months and hard labour at the House of Correction at Wandsworth.

Guilty: seven years' penal servitude.

No counsel appeared for the prisoner.

1867

THE QUEEN
v.
TYSON.

Metcalfe, for the Crown. The allegations on which the prisoner was convicted of perjury were material, as testing his evidence, and affecting his credit as a witness. In *Reg. v. Gibbon* (1) it was held that perjury may be assigned upon evidence going to the credit of a material witness in a cause, although such evidence, being legally inadmissible, ought not to have been received. Moreover, the allegations in question were likely to induce the jury to give a readier credit to the substantial part of the evidence, the alibi contained in the first allegation. (2)

KELLY, C.B. The real question is, whether on this indictment these two statements were material. We all agree that they were, as they tended to render more probable the truth of the first allegation. When it had been sworn by the witness that at the time of the robbery Sullivan was in Mint Street, it tended to render that statement infinitely more credible to add, "I, as deputy, know that he lodged there for nearly two years, and never was absent more than a night or two all that time." Under the circumstances, without giving any opinion as to whether the conviction could have been supported if the evidence had affected the witness's credit only, we affirm the conviction.

BRAMWELL, B. Were the questions material? Clearly they were. Suppose the witness had said: "Sullivan was at such a house from 8 to 10 on a particular night," and his statement had stopped there, the jury would have been rightly told that, in considering his statement, they must bear in mind that the witness had given no reasons or circumstances which enabled him to remember the fact. But, to guard against any such direction to the jury, the witness was asked his reasons for remembering; and thereupon he proceeded to state those circumstances which made him competent to swear to the cardinal matter. One of these circumstances is untrue; why, is that not perjury?

LUSH, J. I was embarrassed at first; but now I am quite

(1) *Leigh & Cave*, C. C. 109; 31 L. J. (M.C.) 98.

(2) *Hawk. P. C. Bk. 1*, c. 27, s. 8.

1887

THE QUEEN
v.
TYSON.

satisfied that the allegations on which the prisoner was convicted were calculated to make the jury give a readier credit to the substantial part of his evidence, and therefore became material.

WILLES and BYLES, JJ., concurred.

Conviction affirmed.

Attorneys for the Crown : *Wontner & Sons.*

Nov. 27.

THE QUEEN v. SMITH.

Perjury—Jurisdiction of Justices.

The prisoner was convicted of perjury alleged to have been committed upon the hearing of an application for an order of affiliation. The information laid by the mother was duly proved; and it was shown that the putative father appeared before the justices, and that evidence was given on both sides:—

Held, that, the father having appeared and not having raised any objection to the summons, it was not necessary to refer to it or give any evidence of its existence on the trial for perjury.

THE following case was stated by Cockburn, C.J.:—

This was a case tried before me at the last assizes for the county of Leicester on an indictment for perjury alleged to have been committed by the defendant on the hearing of an information before two justices on an application by one Louisa Harrison, the mother of an illegitimate child, against one Tom Mee, for an order of affiliation. The indictment alleged that an information was exhibited before two justices by Louisa Harrison against Mee charging him with being the father of her illegitimate child, and that application was made by her to the said justices for a summons against Mee to answer the said complaint; that a summons was accordingly issued by the said justices, and that in obedience to the said summons Mee appeared at a petty sessions to answer the charge. The indictment went on to state the proceedings on the hearing of the summons, and alleged in due form that perjury had been committed by the prisoner Smith. On the trial before me, evidence was given that an information was duly made by the applicant, Louisa Harrison, against the defendant, Mee; and the

information itself was put in and read. It was proved that Mee appeared before the justices, and that, upon the hearing of the information, the evidence which was the subject matter of the present indictment was given by Smith, who was called as a witness by Mee; but the summons was not produced on the trial of Smith, nor was secondary evidence given of its contents, nor was it proved that such summons had been served on Mee. It appeared that it was the practice to give duplicate summonses to the police-constable whose duty it was to serve the summons. The police-constable who served the summons in question not being present at the trial, no evidence of the service of any summons could be given. In all other respects the proceedings before the justices on the hearing of the information were duly proved, and appeared to have been regular and correct.

1867
THE QUEEN
v.
SMITH.

On the close of the case for the prosecution, it was objected on the part of the prisoner that the want of proof of a summons, as required by the 7 & 8 Vict. c. 101, having been served on the defendant in the information was fatal to the present prosecution inasmuch as the summons formed the basis of the magistrates' jurisdiction. I declined to stop the case in that stage; and, witnesses having been called for the defence, and the case having gone to the jury on the merits, the prisoner was found guilty. The question which I have reserved, and on which I desire the decision of the Court, is whether, the information having been duly proved as well as the proceedings upon it at the hearing at the petty sessions, the absence of proof of the summons with which the defendant in the information ought, under the 7 & 8 Vict. c. 101, to have been served, in order to give the justices jurisdiction to hear the information in bastardy, was fatal to the prosecution on this indictment for perjury.

Nov. 23. *Metcalf*, for the prisoner. Under the 7 & 8 Vict. c. 101, s. 2, which requires the putative father to be summoned to the petty sessions, the summons and not the information is the foundation of the proceedings. It was necessary, therefore, to produce the summons; and there was no mode of proving the issue or the materiality of the perjury assigned without its production. The indictment referred to the summons, and on that ground also it be-

1867
 THE QUEEN
 v.
 SMITH.

came necessary to prove it. In *Reg. v. Newall* (1) the prisoner was indicted for perjury alleged to have been committed by him on the hearing before justices of an affiliation summons; and it was held that, to support the indictment, it was necessary to give evidence of the charge made by the mother, either by the production of the original order made thereon, or by giving secondary evidence of the summons after notice to the prisoner to produce it. In *Reg. v. Whybrow* (2) the prisoner was indicted for perjury. A summons had been granted upon an information; and, on the hearing of the summons, the perjury was committed. At the trial the information was produced, but not the summons; and it was held that the information alone was not sufficient, and that the summons should have been produced.

No counsel appeared for the Crown.

Cur. adv. vult.

Nov. 27. The judgment of the Court (Kelly, C.B., Willes, J., Bramwell, B., Byles, J., and Lush, J.) was delivered by

KELLY, C.B. We are of opinion that this conviction must be affirmed. The indictment was for perjury, and alleged that an information was exhibited before the justices; and on the trial for perjury the information itself was put in and read. The objection made was that the summons was not produced at Smith's trial, nor was there any proof of its having been served on him. We are of opinion that the objection cannot be sustained. In this case, though there was no summons produced, the information was put in and proved; and it was shewn that, upon the hearing of the information before the justices, evidence on both sides was given, and that the prisoner gave the evidence which was the subject-matter of the indictment for perjury. Was there any necessity to produce the summons? The original object of the summons was to bring Mee into Court. He did appear; and no objection was then made to the summons. There was no necessity at the trial for perjury to refer to it; and, therefore, it was unnecessary to give any evidence of it.

Conviction affirmed.

Attorney for prisoner: *Cowdell, Hinckley.*

(1) 6 Cox, Crim. Cas. 21.

(2) 8 Cox, Crim. Cas. 438.

CASES
DETERMINED BY THE
COURT FOR CROWN CASES RESERVED
IN
HILARY TERM, XXXI VICTORIA.

THE QUEEN v. KEENA.

Embezzlement—Cheque—Indictment—24 & 25 Vict. c. 96, s. 71.

1868
Jan. 18.

The 24 & 25 Vict. c. 96, s. 71, enacts that, where the offence shall relate to any money or any valuable security, it shall be sufficient to allege the embezzlement, &c., to be of money, without specifying any particular coin or valuable security, and that such allegation, so far as regards the description of the property, shall be sustained, if the offender shall be proved to have embezzled, or fraudulently applied or disposed of, any amount, although the particular species of coin or valuable security of which such amount was composed shall not be proved, or if he shall be proved to have embezzled, or fraudulently applied or disposed of, any piece of coin, or any valuable security, or any portion of the value thereof, although such piece of coin or valuable security may have been delivered to him in order that some part of the value thereof should be returned to the party delivering the same, or to some other person, and such part shall have been returned accordingly:—

Held, that this enactment did not justify an allegation in an indictment of the embezzlement of money, where a cheque only had been embezzled, and there was no proof that the prisoner had ever cashed it.

THE following case was stated by the Chairman of Quarter Sessions for the West Riding of Yorkshire:—

Peter Keena was tried before me and others at the Michaelmas adjourned quarter sessions, held at Bradford for the West Riding of the county of York, on the 4th of December, 1867, charged in the first count of the indictment with embezzling on the 18th of September, at the parish of Dewsbury, certain money to the amount of 4*l.* 14*s.*, the property of Andrew Hirst, his master. The second count charged him with embezzling on the 16th of October,

1868
THE QUEEN
v.
KEENA.

at the parish aforesaid, certain other money, to wit, to the amount of 16*l.* 14*s.*, the property of the said Andrew Hirst, his said master.

No proof was given of the payment to the prisoner of the 4*l.* 14*s.* in the first count mentioned; and that count was abandoned: but proof was given of payment to the prisoner of the 16*l.* 14*s.* in the second count mentioned by a cheque for that amount; but there was no evidence that the cheque had ever been presented or cashed. It was proved that in August last the prisoner sold goods on behalf of the prosecutor for 16*l.* 14*s.* to one Fenton, and that it was the prisoner's duty to pay over all moneys he received to his master on the same day. Fenton proved that the prisoner came to him on the 16th of October for payment of the above 16*l.* 14*s.*, and that he (Fenton) paid prisoner the 16*l.* 14*s.* by cheque; whereupon the prisoner gave a receipt in these words: "Settled, 16th of October, 1867, Peter Keena." The receipt was produced and not disputed. Fenton had not received any notice of dishonour of the cheque. Miller, superintendent of police, proved apprehending the prisoner on the 29th of October at Liverpool, on board a vessel bound for America; and the prisoner, upon being charged with embezzling money the property of his master, said: "It is all right; I intended to send him the money when I got to America."

The prisoner's counsel contended that there was no evidence to support the indictment; that payment by cheque was not a payment in money as stated in the indictment; that the cheque might have been lost and never presented, or that it might have been that James Fenton had no balance at the bank. I held that the cheque was money, and directed the jury to take the law from me, —that receipt of the cheque was receipt of the money. The jury convicted the prisoner; and he was sentenced to be imprisoned in the House of Correction at Wakefield for six calendar months, subject to a case for the opinion of the Court of Criminal Appeal on the above point.

No counsel appeared on either side.

COCKBURN, C.J. The meaning of the 24 & 25 Vict. c. 96, s. 71, is that, if the cheque is turned into money, the prisoner may be indicted for embezzling the money, and upon such indictment the

embezzlement of the cheque, and conversion of it into money, may be shown; or the prisoner may be indicted for the embezzlement of the cheque. Here the prisoner went off with the cheque without turning it into money; and the indictment fails technically. The case also fails substantially; for the prisoner may have gone off without the intention of stealing the cheque, or without the opportunity of giving it to his master. It was necessary to prove more than was done here. If he had been intercepted while presenting the cheque, that would have been some evidence of an intention to embezzle the cheque. Here there is not enough to prove guilt.

1868
THE QUEEN
v.
KEENA.

KEATING, J. I also think the conviction wrong, especially as the judge told the jury that the receipt of the cheque was the receipt of money.

PIGOTT, B. I am of the same opinion upon the facts as they are now before us. The language of the statute is confused; and it is not easy to see what the meaning is.

SHEE, J. The statute seems to mean that calling a cheque money shall not avail the prisoner, if he actually received money for the cheque.

MONTAGUE SMITH, J. A cheque is not money, unless the statute makes it so; but all that the statute seems to mean is, that an indictment charging the embezzlement of any amount of money is sufficient, if it is shown that some amount of money has been received, although it was a security that was embezzled.

Conviction quashed.

THE QUEEN v. BULLOCK.

Jan. 25.

Malicious Injury—Wounding Cattle—24 & 25 Vict. c. 97, s. 40.

Upon an indictment under 24 & 25 Vict. c. 97, s. 40, for maliciously wounding a horse, it is not necessary to prove that any instrument was used to inflict the wound.

THE following case was stated by the Chairman of Quarter Sessions for the county of Gloucester:—

At the general quarter sessions of the peace for the county of

1868

THE QUEEN
v.
BULLOCK.

Gloucester, holden on the 1st of January, 1868, George Bullock was tried before me on an indictment which charged him with maliciously and feloniously wounding a gelding, the property of James Ricketts. The prisoner pleaded not guilty.

On the trial it was proved that the prisoner, who was sent by his master with a cart and horse to fetch stone from a distant field on the 20th of December last, at half-past one p.m., returned about four p.m., bringing back the horse with his tongue protruding seven or eight inches, and unable to draw it back into his mouth. The veterinary surgeon, who examined the horse the following day, proved that he found the roots and lower part of the tongue much lacerated, and the mouth torn, and clogged with clotted blood; the injury, he considered, might have been done by a violent pull of the tongue on one side. He was obliged to amputate five inches of the tongue; and the horse is likely to recover. The prisoner's statement was that the horse bit at him, and he did it in a passion. There was no evidence to shew that any instrument beyond the hands had been used. The prisoner's counsel contended that, no instrument having been proved to have been used in inflicting the injury, the prisoner could not be convicted under the 24 & 25 Vict. c. 97, s. 40. For the prosecution it was maintained that it was not necessary to show that the injury had been caused by any instrument other than the hand or hands of the prisoner. The prisoner's counsel, on the point being reserved, declined to address the jury; and a verdict of guilty was found by them.

I respited the judgment, and liberated the prisoner on recognizance, in order that the opinion of the justices of either Bench and the Barons of the Exchequer might be taken on the question, whether the prisoner was properly convicted of the wounding, there being no evidence to shew that he used any instrument other than his hand or hands.

No counsel appeared for the prisoner.

Sawyer, for the Crown. It is not necessary to shew that any instrument was used for the purpose of inflicting the wound. In *Reg. v. Jeans* (1), which was similar in its circumstances, it was

(1) 1 C. & K. 539.

decided that, to constitute a maiming, there must be a permanent injury; and, the count charging a wounding having been abandoned by the counsel for the prosecution, the point now taken was not decided. On the argument, however, two cases were cited as proving that the use of an instrument is necessary to constitute a wounding. In the first of these cases, *R. v. Owens* (1), pouring acid into the ear of a mare, some of which ran into her eye and destroyed the sight, was held to constitute a maiming, but not a wounding, but not on the ground that the use of an instrument was necessary. In the second case, *R. v. Hughes* (2), it was held that injuring a sheep by setting a dog to worry it was not a maiming or wounding within the 4 Geo. 4, c. 54, s. 2. It has never been held that it was necessary to shew that an instrument had been used in the case of wounding cattle, although in the case of injuries to the person such proof has been held to be necessary under the earlier statutes, the language of which differed from that of the statute now under consideration: *Jennings's Case*. (3)

1868
THE QUEEN
v.
BULLOCK.

COCKBURN, C.J. It has been satisfactorily shewn that no instrument need be used to inflict the wound. Under this statute the word "wound" must be taken in the ordinary sense; for the mischief is just as great where manual power is used as if it were inflicted by an instrument. The language of the 24 & 25 Vict. c. 100, s. 11, was intentionally altered, in order to meet the difficulty suggested, in cases of injury to the person, by *Jennings's Case* (3), and similar cases.

KEATING, J., PIGOTT, B., and SHEE and LUSH, JJ., concurred.

Conviction affirmed.

Attorneys for the Crown: *Rogerson & Ford*, for *Carter & Gould*, *Newnham*.

(1) 1 Moo. C. C. 205.

(2) 2 C. & P. 420.

(3) 2 Lew. C. C. 130; and see now,

as to personal injuries, the 24 & 25

Vict. c. 100, s. 11.

1868

Jan. 18.

THE QUEEN v. SHEPHERD.

Larceny—Trees—Amount of Injury done—24 & 25 Vict. c. 96, s. 32.

The 24 & 25 Vict. c. 96, s. 32, enacts that whosoever shall steal, or cut, destroy or damage with intent to steal the whole or any part of any tree, &c., shall (in case the value of the article or articles stolen, or the amount of the injury done, shall exceed the sum of 5*l.*), be guilty of felony:—

Held, that in estimating the amount of the injury, the injury done to two or more trees may be added together, provided the trees are damaged at one and the same time, or so nearly at the same time as to form one continuous transaction.

THE following case was stated by the Chairman of Quarter Sessions for the county of Devon:—

Benjamin Shepherd was tried before me at the Midsummer sessions, 1867. The indictment consisted of three counts: the first, under the 24 & 25 Vict. c. 96, s. 32, charged the prisoner with stealing eight oak trees of a value exceeding 5*l.*, the property of the Right Honourable William Wells, Viscount Sidmouth, growing on lands of the said Viscount Sidmouth, in the parish of Up-Ottery, in the county of Devon. The second count, under the same statute and section, charged the prisoner with cutting with intent to steal these eight trees growing elsewhere than in a park, pleasure-ground, orchard, or avenue, or any ground adjoining or belonging to any dwelling house, thereby then doing injury to the said Viscount Sidmouth to an amount exceeding the sum of 5*l.* The third count charged a larceny of the trees at common law. The charge of larceny was abandoned by the prosecution, as the trees had not been removed.

It was proved in evidence that a sale of standing timber, the property of Viscount Sidmouth, to the number of 261 oak trees, had taken place by auction on the 5th of February, 1867, and that the trees had been purchased by three persons, one of whom, Mr. Heath, purchased forty-nine trees, marked, for the purposes of the sale, with the numbers 73 to 120 inclusive, and 261. These trees were all standing on Aller, Chapplehayes, and Buckethayes farms in Up-Ottery; they were not grouped together, but were for the most part standing in hedges on these farms at various distances from one another. Mr. Heath employed the prisoner,

who was a carpenter and accustomed to the work, to fell and bark these trees in the usual way. The prisoner engaged about five men to assist him in the work. None of the trees included in the sale were the subject of the indictment, but eight other trees not marked for sale or sold. The evidence shewed that the felling and ripping of the trees bought by Mr. Heath took place during the ripping season of 1867, which extended over the month of May, and that during that time the eight trees in question were felled, stripped of bark, and had their tops cut off. There was evidence to connect the prisoner with the felling of these trees; but there was no evidence to shew the precise day or days on which these trees, or any of them, were felled, or on how many days the prisoner and his assistants were engaged in the work; but it was proved that the work was commenced and steadily prosecuted without intermission until the whole number of trees which the prisoner had been employed to throw were thrown; and it was then found that the eight trees in question had also been felled, and were lying on the ground. The bark and tops of these eight trees had been removed and sold by the prisoner; and he offered the trees themselves for sale as they lay on the ground after the bark and tops had been removed from them. The injury resulting from the cutting down of these trees did not amount, in the case of any one tree, to 5*l*. The value of the eight trees, with their tops and bark, amounted altogether to 24*l*. 15*s*. 9*d*.

At the close of the case for the prosecution the prisoner's counsel objected that there was no evidence to go to the jury that the prisoner at any one time cut any trees, thereby doing injury to an amount exceeding 5*l*. The Court overruled the objection, and left the case to the jury, directing them that, in order to convict the prisoner, they must be satisfied that he cut down at one time, or so continuously as to form one transaction, such a number of the trees as would make the injury done amount to a sum exceeding 5*l*. The jury found the prisoner guilty; and he was sentenced to nine months' imprisonment with hard labour; but, at the request of the prisoner's counsel, the Court reserved the point; and the prisoner was discharged on bail, to surrender in execution when called upon by the clerk of the peace for the time being.

The question for the Court is, whether there was any evidence

1868

THE QUEEN
v.
SHEPHERD.

1868
THE QUEEN
v.
SHEPHERD.

to go to the jury to shew that injury, amounting in the aggregate to a sum exceeding 5*l.*, was done by feloniously cutting trees so continuously as to constitute the offence charged in the second count of the indictment. If the Court should be of opinion that there was any such evidence, the conviction will be affirmed; if not, the conviction will be quashed.

No counsel appeared for the prisoner.

Mortimer, for the Crown. In order to ascertain the amount of the injury done within the meaning of the section (1), it is allowable to add together the value of different trees cut down at the same time. In *R. v. Hodges* (2), it appears to have been assumed that the value of two or more young pear trees might be added together in order to make up the necessary amount. In *Reg. v. White-man* (3), it would seem that, although consequential damage cannot be taken into account, the value of separate trees injured or cut down may be combined.

COCKBURN, C.J. There is evidence of one continuous taking; and that was properly left to the jury, as well as the evidence of the value of the trees. The question for us is whether, by s. 32, the value of two trees may be put together for the purpose of making up the necessary amount of damage. I cannot but regret that, in consolidating the statute, a clause so inartistically drawn should have been allowed to stand without putting it into clearer language. On the whole, I think the value of the trees may be combined. The section says "the whole or any part of any tree;" this looks like the part of any one tree. Then, does the latter part of the section, where the words "article or articles" are used, warrant us in reading the word "tree" in the plural, or should it be understood to mean any one tree of the value of 5*l.*? I think the amount of injury must be taken to refer to the word

(1) The 24 & 25 Vict. c. 96, s. 32, enacts that whosoever shall steal, or shall cut, break, root up, or otherwise destroy or damage with intent to steal, the whole or any part of any tree, sapling, or shrub, or any underwood respectively growing elsewhere than in any of the situations in this section

before mentioned, shall (in case the value of the article or articles stolen, or the amount of the injury done, shall exceed the sum of five pounds) be guilty of felony.

(2) *M. & M.* 341.

(3) *Dears. C. C.* 353.

“articles,” and must be read “injury done to an article or articles exceeding the sum of 5*l*.” If the word “underwood” were omitted, the word “articles” would fairly bear the construction I have indicated; but the difficulty is that the latter expression may apply to underwood only. It is impossible, however, to suppose that the legislature intended to protect underwood and not, so far as the corresponding value is concerned, growing timber; and this enables us to get over the difficulty by saying that injury done to 100 underwood at 1*s*. each, and injury done to five trees at 1*l*. each, are equally included, and that the amount of damage, if exceeding 5*l*. in respect of two or more trees, is sufficient to support the indictment.

1868
THE QUEEN
v.
SHEPHERD.

KEATING, J., PIGOTT, B., and SHEE and MONTAGUE SMITH, JJ., concurred.

Conviction affirmed.

Attorneys for the Crown: *Barlow & Bowling, for Stamp & Son, Honiton.*

END OF HILARY TERM, 1868.

CASES

DETERMINED BY THE

COURT FOR CROWN CASES RESERVED

IN

EASTER TERM, XXXI VICTORIA.

1868

April 25.

THE QUEEN v. WESTERN.

*Indictment—Amendment—14 & 15 Vict. c. 100, s. 1—Information—Game—
9 Geo. 4, c. 69, s. 1.*

The judge has power, under the 14 & 15 Vict. c. 100, s. 1, to amend an indictment for perjury, describing the justices before whom the perjury was committed as justices for a county, where they are proved to be justices for a borough only.

An information, under the 9 Geo. 4, c. 69, s. 1, for entering land for the purpose of taking game, is sufficient to give the justices before whom it is laid jurisdiction to hear the charge, although it does not allege that the entry was for the purpose of taking game *there*.

THE following case was stated by Blackburn, J.:—

The prisoner was tried before me, at the last assizes for Devonshire, for perjury. The indictment alleged that, “at a petty session of the peace holden in the parish of Tiverton, in the county of Devon, a certain charge and complaint came on to be heard in due form of law before John Lane, Esq., and Samuel Garth, Esq., then respectively being justices of the peace of our Lady the Queen assigned to keep the peace in and for the said county, and acting in and for the borough of Tiverton in the said county, against Thomas Martin, for that he, to wit, on the night of the 31st of January, 1863, at Chettercombe Barton, in the parish of Tiverton, in the borough of Tiverton, unlawfully did enter and be on certain land there, called Quarry Down Close, with a certain

gun and other instruments for the purpose of taking and destroying game contrary to the statute in such case made and provided," and then alleged that the prisoner committed perjury on the hearing of that complaint.

1868
THE QUEEN
v.
WESTERN.

On the evidence it appeared that an information or complaint in writing against Martin and the now prisoner Western was laid before a justice of the borough of Tiverton in 1863. Western was then convicted; but, Martin having absconded, a warrant was issued against him, and he was not taken till 1868, when the complaint against him was heard before the two gentlemen named in the indictment, who were justices for the borough of Tiverton only, and were not justices for the county. On the hearing of this complaint Western was called as a witness, and swore that Martin was not the person who was with him poaching on that night; and on this the perjury was assigned. It was objected that, though the two justices for the borough had jurisdiction to hear the complaint, yet, not being justices *in and for the county*, the allegation in the indictment was not proved. To this it was answered that the fact that they were justices for the borough, which was within the county, was proof of the averment, or that the words "in and for the county" might be rejected as surplusage. I was, however, of opinion that the averment being descriptive required to be proved as laid. It was then urged that I had power to amend the indictment so as to cure the variance, either under the 9 Geo. 4, c. 15, or under the 14 & 15 Vict. c. 100, s. 1. I thought that the 9 Geo. 4, c. 15, did not apply to this case, and doubted whether the variance came within the meaning of the 14 & 15 Vict. c. 100, s. 1, as, though it was a variance in the description of persons in the indictment named and described, it seemed to me doubtful whether those words in the act were not confined to variances ejusdem generis with a variance in the name of such persons. I thought, however, that, if I had power to make the amendment, it was proper to exercise it, and therefore directed the indictment to be amended by striking out the words "the said county," so as to make the averment be that they were justices "assigned to keep the peace in and for, and acting in and for, the borough of Tiverton, in the said county," subject to the opinion of the Court of Criminal Appeal as to my power to make such an amendment.

1868
THE QUEEN
v.
WESTERN.

It was further objected that the information or complaint in writing (which was in the same words as those used in the indictment) disclosed no offence, as it did not allege that Martin was in Quarry Down Close for the purpose of destroying game *there*, and *Fletcher v. Calthorpe* (1) was cited in support of this position. It appeared on the evidence that the charge actually made and heard before the justices was for poaching *there*; and I thought that, inasmuch as the justices had jurisdiction over the complaint which was, in fact, heard before them, the prisoner, if he wilfully gave false evidence with intent to mislead them, was liable to punishment, even if the written complaint was informal; but, having reserved the point as to the variance, I reserved this point also. The case was then left to the jury; and the prisoner was convicted, and liberated on bail.

The opinion of this Court is requested,—1st, whether I had power to amend as I did; and, if I had not such power, whether as the indictment originally stood there was a fatal variance: 2ndly, whether the form of the complaint before the justices prevented the conviction of the prisoner under this indictment.

No counsel appeared for the prisoner.

A. Collins, for the Crown. The amendment was properly made under the 14 & 15 Vict. c. 100, s. 1. (2)

[KELLY, C.B. There can be no doubt on that point. It was a description of the justices.]

As to the second point, the information follows the words of the statute, the 9 Geo. 4, c. 69, s. 1, and is sufficient to give the justices jurisdiction to inquire into the charge. The case cited at the trial relates to the form of the conviction only.

KELLY, C.B. It is perfectly clear that the justices had jurisdiction, and that the perjury was well assigned.

(1) 6 Q. B. 880.

(2) That section enacts that "when-
ever, on the trial of any indictment for
any felony or misdemeanor, there shall
appear to be any variance between the
statement in such indictment and the
evidence offered in proof thereof . . .

in the christian name or surname, or
both christian name and surname, or
other description whatsoever, of any
person or persons whomsoever therein
named or described, it shall and may
be lawful for the court, &c., to order
such indictment to be amended, &c."

KEATING, J., PIGOTT, B., MONTAGUE SMITH, and HANNEN, JJ.,
concurrent.

1868

THE QUEEN
v.
WESTERN.

Conviction affirmed.

Attorneys for the Crown: *Greaves & Walker, for G. W. Cockram, Tiverton.*

THE QUEEN v. MCKALE.

April 25.

Larceny—Possession obtained by Fraud.

The prisoner with another man went into the shop of the prosecutrix and asked for a pennyworth of sweetmeats, for which he put down a florin. The prosecutrix put it into the money-drawer, and put down sixpence in silver and fivepence in copper in change, which the prisoner took up. The other man said, "You need not have changed," and threw down a penny, which the prisoner took up; and the latter then put down a sixpence in silver and sixpence in copper on the counter, saying, "Here, mistress, give me a shilling for this." The prosecutrix took a shilling out of the money-drawer and put it on the counter, when the prisoner said to her, "You may as well give me the two-shilling-piece and take it all." The prosecutrix took from the money-drawer the florin she had received from the prisoner, and put that on the counter, expecting she was to receive two shillings of the prisoner's money in exchange for it. The prisoner took up the florin; and the prosecutrix took up the silver sixpence and the sixpence in copper put down by the prisoner, and also the shilling put down by herself, and was putting them into the money-drawer, when she saw she had only got one shilling's worth of the prisoner's money; but at that moment the prisoner's companion drew away her attention, and, before she could speak, the prisoner pushed his companion by the shoulder, and both went out of the shop:—

Held, that the property in the florin had not passed to the prisoner, and that he was rightly convicted of larceny.

THE following case was stated by the Chairman of Quarter Sessions for the county of Nottingham:—

At the sessions holden at Nottingham, in December last, Patrick McKale was indicted and tried before me for feloniously stealing 2s., the moneys of Elizabeth Pickering. At the trial it was proved that Mrs. Pickering kept a shop for the sale of small articles. On the 25th of October, prisoner and another man not in custody both strangers to Mrs. Pickering, went into her shop; and prisoner asked Mrs. Pickering for a pennyworth of peppermints (sweetmeats), which she served, and prisoner put on the counter a two-shilling-piece in payment. Mrs. Pickering took up the two-shil-

1868

THE QUEEN
v.
MCKALE.

ling-piece, and put it into the money-drawer, and took out of the same drawer a shilling and a sixpence in silver and five pence in copper, and put these moneys (1s. 11d.) on the counter as the proper change for the 2s., after deducting the penny for the sweetmeats. Prisoner took up the 1s. 11d.; and the other man said to prisoner, "What was it you gave her?" Mrs. Pickering replied, "A two-shilling-piece." The other man said to prisoner, "You need not have changed;" and at the same time threw down a penny on the counter. The prisoner took up the penny, and put a sixpence in silver and sixpence in copper on the counter, and said to Mrs. Pickering, "Here, mistress, give me a shilling for this." Mrs. Pickering then took a shilling out of the money-drawer, and put that shilling on the counter; and prisoner said to her, "You may as well give me the two-shilling-piece, and take it all." Mrs. Pickering then took from the money-drawer the same two-shilling-piece she had received from the prisoner, and put that on the counter, expecting she was to receive two shillings of the prisoner's money in exchange for it. Prisoner took up the two-shilling-piece, and Mrs. Pickering took up the silver sixpence and the sixpence in copper put down by the prisoner, and also the shilling put down by herself, and was putting them into the money-drawer, when she saw she had only got the silver sixpence and sixpence in copper of the prisoner's money and the shilling of her own money in exchange for the two-shilling-piece; but at the same moment prisoner's companion pointed to some twist sweetmeats, and said to her, "How do you sell that?" and, before she could speak, prisoner pushed his companion by the shoulders, and said, "You don't want any of that;" and both went out of the shop, prisoner taking the two-shilling-piece. In answer to a question, Mrs. Pickering said she did not intend parting with the two-shilling-piece without getting full change for it.

Upon this evidence it was contended by the counsel for the prisoner:—1st, that upon the facts proved, the prisoner could not be convicted of larceny upon the present indictment; and 2nd, that Mrs. Pickering parted not only with the possession of the two-shilling-piece, but also with the property in it; and therefore there was no larceny. Upon these objections counsel for the prisoner called upon me not to let the case go to the jury. I

refused to stop the case, and directed the jury—1. That Mrs. Pickering was deprived of a shilling in value; for that the prisoner taking her two-shilling-piece left her in exchange only one shilling of his money. 2. That, although Mrs. Pickering did put down the two-shilling-piece on the counter, intending to part with it in exchange for two shillings, yet that, if the jury believed she intended only to part with it in exchange for two shillings of the prisoner's money, the parting with it by her under the circumstances stated would not be a parting with the property in it, if the jury believed those circumstances to be fraudulently contrived by the prisoner and his companion. I left it to the jury to say whether the taking away of the two-shilling-piece under the circumstances was an error or mistake, and unintentional on the part of the prisoner; or whether they believed that the prisoner and his companion went into the shop intending to defraud Mrs. Pickering, and that they did obtain from her by fraud the two-shilling-piece, meaning to steal from her a shilling in value; and, if they should be of the latter opinion, I directed them that that was larceny. Upon this direction the jury found the prisoner guilty; and, a case being demanded, I state this case for the opinion of the Court of Criminal Appeal. If the Court shall be of opinion that the facts proved do not amount to larceny, and that my direction was wrong, the prisoner is to be discharged; but, if the Court think the facts proved do amount to larceny, and that I directed the jury aright, the prisoner is to be brought up for sentence.

1868

 THE QUEEN
 v.
 MCKALE.

J. W. Mellor, for the prisoner. In this case Mrs. Pickering had parted with the property in the two-shilling-piece; and, although she may have done so under a mistake, yet that will not make the prisoner's act amount to larceny. He might, indeed, have been convicted of obtaining the money by false pretences. The true principle is laid down in *Russell on Crimes* (1); and in *Nicholson's Case* (2), it was held that there can be no larceny where the property is parted with, although that is brought about by fraud.

[*KELLY*, C.B. Mrs. Pickering discovered that she had only got

(1) Vol. ii. 4th edit. by Greaves, p. 196-198.

(2) 2 Leach, 610; 2 East, P. C. c. 16, s. 103, p. 669.

1868
THE QUEEN
v.
MCKALE.

a shilling before the transaction was at an end. If the money had been put into the till, and the transaction had been completed, the case might have been different. She never intended to part with the property unless she got the full change.]

Case, for the Crown. The property had not passed, because the transaction was not complete. Mrs. Pickering was entitled to a reasonable time for the inspection of the change before accepting it. In this case that time had not elapsed; and Mrs. Pickering had not accepted the change. The property in the two-shilling-piece consequently still remained in her, and had not been transferred to the prisoner. In *Oliver's Case* (1), where the prisoner had 35*l.* in bank-notes handed to him for the purpose of changing into gold, and he went out with the notes promising to return immediately with the gold, but did not do so, it was held that he was guilty of larceny. In that case Wood, B., held that the property had never been parted with, because, "that could only be done by contract, which required the assent of two minds, that here was not the assent of the mind either of the prosecutor or of the prisoner; the prosecutor only meant to part with his notes on the faith of having the gold in return, and the prisoner never meant to barter but to steal." That case was recognized in *Reg. v. Williams* (2), and in *Reg. v. Rodway*. (3) In the former case the prisoner went to a shop, and asked a boy there for change for a half-crown. The boy gave him two shillings and sixpence, and the prisoner held out a half-crown which the boy touched but never got hold of; and the prisoner ran away with the change. The prisoner was convicted of larceny of the change, Park, J., observing that, if the prisoner had only been charged with stealing the half-crown, he should have had great doubt. In the latter case the prisoner was convicted of stealing a receipt for rent which was given him to look at, but which the prosecutor stated he did not expect to get back, although he did not intend to part with it without receiving his money.

Mellor, in reply. In *Jackson's Case* (4) it was held that if a pawnbroker's servant, who has a general authority from his master, delivers up a pledge to the pawner on receiving a parcel which he is by fraud induced to suppose to contain valuable diamonds, there

(1) 4 Taunt. at p. 274; 2 Leach, 1072.

(2) 6 Car. & P. 390.

(3) 9 Car. & P. 784.

(4) 1 Moo. C. C. 119.

is no larceny of the pledge. In *Reg. v. Williams* (1) the boy never intended to part with the property in the half-crown, and the transaction was clearly not at an end. In *Rodway's Case* (2) the receipt was only handed to the prisoner for a special purpose, viz., to be looked at. *Oliver's Case* (3) is inconsistent with the later authorities, and cannot be supported.

1868

THE QUEEN
v.
MCKALE.

KELLY, C.B. The distinction between fraud and larceny is well established. In order to reduce the taking under such circumstances as in the present case from larceny to fraud, the transaction must be complete. If the transaction is not complete, if the owner has not parted with the property in the thing, and the accused has taken it with a fraudulent intent, that amounts to larceny. In this case the prisoner wishes to have back his two-shilling-piece, and is to give two shillings in money to Mrs. Pickering in exchange. She puts down the two-shilling-piece, expecting to receive two shillings of the prisoner's money. Did she part with the property in the two-shilling-piece by putting it down on the counter? It is clear that she did not. If the prisoner had taken it up immediately without giving the change, she would have stopped him. The placing the two-shilling-piece on the counter was only a step in the transaction. Then the prisoner took up the two-shilling-piece. That cannot make the transaction complete, and does not affect the question. Mrs. Pickering next takes up the change. Is the mere taking up of the change a parting with the property in the two-shilling-piece? I am clearly of opinion that it is not. She is putting the change into the drawer, when she sees she has only got a shilling of the prisoner's money. She takes up the money, imagining it to be the whole change; but she corrects her error in a moment; and but for the act of the confederate she would have said, "You have only given me a shilling; give me the other shilling, or give me back the two-shilling-piece." Up to that time the transaction remained incomplete; and, when the prisoner carried off the two-shilling-piece, he took something the property in which had not passed out of her, and, calling away her attention by fraud, quitted the shop. He knew that it was her property,

(1) 6 Car. & P. 390.

(2) 9 Car. & P. 784.

(3) 4 Taunt. 274; 2 Leach, 1072.

1888
THE QUEEN
v.
McKALE.

and that he was taking it against her will, and consequently he was guilty of larceny. In *Jackson's Case* (1) the shopkeeper did not open the parcel, but took it on the assumption that it contained diamonds, and had deliberately, finally, and completely handed over the property in exchange for the parcel to the prisoner. The whole question here is whether Mrs. Pickering had finally, and completely, and deliberately parted with the property; and I am of opinion that she had not, and that the prisoner was guilty of larceny.

KEATING, J. I am of the same opinion. The distinction between some of the cases is very fine. Looking at this case by the light of the facts as stated, I am of opinion that the conviction should be affirmed.

PIGOTT, B. I am of the same opinion. The transaction was never completed.

MONTAGUE SMITH, J. At first I entertained some doubt; but, after hearing the argument, I have arrived at the conclusion that the conviction is right. Mrs. Pickering put down the two-shilling-piece conditionally only, expecting that she was going to receive two shillings of the prisoner's money.

LUSH, J. For some time I was unable to agree with the view entertained by my brethren. The difference between us was not, however, one of principle, but lay in the conclusions we drew from the facts of the case. Looking at the case again, I think that Mrs. Pickering may not have intended to part with the property until she had received another shilling from the prisoner, and am of opinion that on this ground the conviction may be supported.

Conviction affirmed.

Attorney for the Crown : *Pachitt, Nottingham.*

Attorneys for prisoner : *Wright & Bonner, for Cranch, Nottingham.*

(1) 1 Moo. C. C. 119.

THE QUEEN v. MARSDEN.

Assault—Arrest—Resisting Officer.

1868

April 25.

The prisoner assaulted a police constable in the execution of his duty. The constable went for assistance, and after an interval of an hour returned with three other constables, when he found that the prisoner had retired into his house, the door of which was closed and fastened; after another interval of fifteen minutes the constables forced open the door, entered, and arrested the prisoner, who wounded one of them in resisting his apprehension :—

Held, that, as there was no danger of any renewal of the original assault, and as the facts of the case did not constitute a fresh pursuit, the arrest was illegal.

THE following case was stated by Montague Smith, J. :—

The prisoner was tried and convicted before me at the spring assizes, 1868, at Nottingham, on an indictment which charged him with feloniously wounding George Wesson, a police constable, with intent to resist his lawful apprehension. The facts were that the prisoner lodged at his father's house in Lower Town Street, Nottingham. About twelve o'clock on the night of Saturday, the 29th of February, the prisoner, suspecting a man called Wormald was listening at the windows of the house, came into the street, and used threatening language to him. Raison, a police constable, came up and interfered to put a stop to the altercation; and the prisoner then turned upon him, and struck him with his fist; and there was a struggle between them. Raison, the police constable then went away for assistance, and remained absent for an hour. In the interval he changed his plain clothes for his uniform; and he returned to the house with three other constables, Wesson, Ash, and Harabin. The prisoner had then retired into the house; and all was quiet. The door of the house was closed and fastened. Raison asked the prisoner to open the door; and he refused. The constables tried the door several times; and, after an interval of ten minutes or a quarter of an hour, finding they could not get into the house, they determined to send for a serjeant of police. One of them then went to the police station, distant about half a mile, and, after another interval of fifteen or twenty minutes, returned with serjeant Hind. The serjeant and Harabin went to the back door. Raison, Wesson, and Ash remained by the front door.

1868
THE QUEEN
v.
MARSDEN.

These three constables again demanded admission, and were refused; and they then forced open the front outer door, and entered the house. The constables saw the prisoner standing on the top of the stairs with a bill-hook in his hand. Raison asked the prisoner to come down. He refused, and threatened to kill the first man who came up. Wesson then said, "Here's at him;" and the three constables, Wesson, Raison, and Ash, ran up stairs to lay hold of him. The prisoner then struck Wesson with the hook upon the head, and wounded him. A struggle ensued, in which Raison was also wounded by the prisoner with the hook. The prisoner was overpowered, and taken into custody, having himself received severe wounds on the head from the constables in the struggle.

It was contended for the prisoner that the apprehension was not lawful—the assault was over, there was no further assault or affray to be apprehended, and no such fresh pursuit as would justify the constables in breaking into the house or apprehending the prisoner: See *Reg. v. Gardener* (1); *Reg. v. Walker*. (2) I reserved these points for the consideration of the Court for Crown Cases Reserved. If the apprehension was not lawful, it is to be taken that there was no excess in this resistance offered by the prisoner.

No counsel appeared on either side.

KELLY, C.B. The question in this case is whether there was a lawful apprehension, which depends on whether the attack on the constable in the house was merely a continuance of the struggle which took place on the occasion of the first assault. Between the constable quitting the premises and his returning with the other constables, an hour had elapsed; and it is impossible to say that what then occurred was a continuation of the previous transaction. The original assault and the rights connected therewith were at an end; and I am of opinion, independently of authority, that the apprehension was unlawful. If there could have been any doubt upon the subject, *Reg. v. Walker* (2) would be conclusive.

MONTAGUE SMITH, J. There was nothing here to show any reasonable apprehension that the affray would be continued; nor

(1) 1 Moo. C. C. 390.

(2) Dears. C. C. 358.

was there such a fresh pursuit as to justify the constable in breaking into the house.

1868

THE QUEEN
v.
MARSDEN.

KEATING, J., PIGOTT, B., and LUSH, J., concurred.

Conviction quashed.

THE QUEEN v. BRACKENRIDGE AND KING.

May 2.

Forgery—Bank-notes—Scotch Bank—24 & 25 Vict. c. 98, ss. 16, 55.

The 24 & 25 Vict. c. 98, s. 16, extends to the engraving in England without authority of notes purporting to be notes of a banking company carrying on business in Scotland only; notwithstanding that s. 55 enacts that nothing in the act contained shall extend to Scotland.

THE following case was stated by Montague Smith, J. :—

The two prisoners were tried and convicted before me at the spring assizes for Warwickshire, 1868, on an indictment which charged them with feloniously, and without lawful authority and excuse, engraving upon a plate part of a promissory note, purporting to be a part of a bank-note of the British Linen Company, carrying on the business of bankers, for the payment of 5*l.*, contrary to the form of the statute, &c. (see the 24 & 25 Vict. c. 98, s. 16.)

The evidence shewed that the prisoners had engraved upon a plate part of a bank-note for five pounds, purporting to be a note of a Scotch banking company called the British Linen Company, and had made arrangements with a printer for printing a large number of notes from the plate, when engraved. It was proved that the British Linen Company was a Scotch banking company, carrying on the business of bankers at Edinburgh, and at other places in Scotland, and not carrying on the business of bankers out of Scotland.

It was objected on behalf of the prisoners that they were not indictable under the 24 & 25 Vict. c. 98, inasmuch as that act did not apply to the engraving, &c., of the plates of notes of Scotch banks; and ss. 19 & 55 of the act were referred to. I reserved the point for the consideration of the Court of Criminal Appeal.

1868

No counsel appeared for the prisoners.

THE QUEEN
v.
BRACKEN-
RIDGE AND
KING.

Overend, Q.C. (*Beasley* with him), for the Crown. The 24 & 25 Vict. c. 98, consolidates the statutes relating to forgery; and this conviction is under s. 16 of that statute for engraving upon a plate part of a bank-note of a Scotch banking company. (1) The prosecution contend that the notes of a Scotch bank are included in the words of the section, "or of any other body corporate, company, or person carrying on the business of bankers." On behalf of the prisoner, reliance was placed on s. 55, that "nothing in this act contained shall extend to Scotland, except as otherwise hereinbefore expressly provided;" and it was contended that this being a Scotch bank, and the case not being expressly provided for, the act did not apply. Section 55 is, however, merely a loose mode of expression, and has the same meaning as the words in the 11 Geo. 4 & 1 Wm. 4, c. 66, s. 29: "This act shall not extend to any offence committed in Scotland;" and the words, "hereinbefore otherwise expressly provided," have reference to offences committed in Scotland, one of which, namely, the forging of the seal of the union, is expressly provided for by s. 1. In no other section is Scotland mentioned. If this interpretation is not put on s. 55, this anomaly would exist, that by the 19th section it would be an offence to forge any foreign note in England, but not to forge a Scotch note. In *Reg. v. Hannon* (2), it was decided that s. 18 of the 11 Geo. 4 & 1 Wm. 4, c. 66 (from which s. 16 of the act now in question was taken), applied to plates of promissory notes of persons carrying on the business of bankers in the province of Upper Canada.

KELLY, C.B. This is an important question; yet it appears to us to be free from difficulty. The indictment is under s. 16, which contains the words, "or of any other body corporate, company, or

(1) That section enacts that "who-soever without lawful authority or excuse . . . shall engrave or in any-wise make any plate, &c., of any promissory note, &c., purporting to be a bank-note, &c., of the governor and company of the Bank of England, or of the governor and company of the Bank of

Ireland, or of any other body corporate, company, or person carrying on the business of bankers, . . . shall be guilty of felony."

(2) 9 C. & P. 11. See also *Reg. v. Keith*, Dears. C. C. 486, and *Reg. v. Kirkwood*, 1 Moo. C. C. 311.

1868

THE QUEEN
v.
BRACKEN-
RIDGE AND
KING.

person carrying on the business of bankers." We are all of opinion that under these general words a bank in Scotland, or in the colonies, must be taken to be included. The only doubt that could arise would be owing to the wording of s. 55; but it would be of serious importance if that section were to exclude Scotch notes; for it would then leave bankers in Scotland and in the colonies unprotected. Such could not have been the intention of the legislature. The true meaning of the words, "nothing in this act shall extend to Scotland," is restricted to offences committed in Scotland, thereby excluding from acts of parliament relating to England and Ireland offences committed and punishable in Scotland. The words "hereinbefore expressly provided for" would lead us to expect some express provision in the act with reference to Scotland. Scotland is mentioned in s. 1; but that is all. These words have, in fact, no operation at all. We therefore come back to s. 16; and we are of opinion that that section applies to the present case.

MONTAGUE SMITH, J. At the trial, my opinion was in favour of the view now adopted by this Court; but, after hearing the able argument of Mr. Buszard, who then appeared for the prisoners, I felt bound to reserve the point.

KEATING, J., PIGOTT, B., and HANNEN, J., concurred.

Conviction affirmed.

Attorneys for the Crown: *Young, Maples, Teesdale, and Nelson, for Whateleys & Whateley, Birmingham.*

1868

May 2.

THE QUEEN v. ROGERS.

Larceny—Constructive Possession—Jurisdiction—24 & 25 Vict. c. 96, s. 114.

The prisoner stole a watch at Liverpool, and sent it by railway to a confederate in London:—

Held, that the constructive possession still remained in the prisoner, and that he was triable at the Middlesex Sessions.

THE following case was stated by the Assistant Judge for Middlesex:—

John Rogers and Charles Byatt were tried before me at the sessions for Middlesex, on the 3rd of March, 1868, for stealing and receiving a watch, the property of John Shaw. Byatt pleaded guilty; Rogers was found guilty of stealing.

John Rogers resided at Liverpool, and forwarded by railway a box containing the watch in question, and several other stolen watches, to the prisoner Byatt; and the box was delivered in due course to Byatt, in the county of Middlesex. It was contended that, as Rogers was not shewn to have left Liverpool, the Court had no jurisdiction to try him. I told the jury that, if they believed Rogers to have stolen the watch, his transmission of it into the county by the agency of the railway was sufficient to give the Court jurisdiction, although he did not personally convey it. It was proved that Rogers had advised Byatt of the transmission of the box by a letter found in Byatt's possession, and which was as follows:—

“Liverpool, Jan. 30, 1868.

“I send you up the goods this morning; they are as follows:—

	£.	s.
13 W. Levers	15	12
4 W. Genevas	1	12
1 R. Lever	6	0
1 R. Geneva	1	5
1 Red Case, 1242 dwts. . . .	1	5
1 Red Slang, 1 oz. 17 dwts. . . .	2	5
Ditto, 1 oz. 2 dwts. . . .	1	7
	<hr/>	
	29	6

"Try and deal this time without so much wrangling; you did not come down as you promised.

1868

"DICK."

THE QUEEN
v.
ROGERS.

Articles corresponding with this letter were contained in the box found at Byatt's. The box was addressed to his house in the handwriting of Rogers; and a similar box empty, with similar address in Rogers' handwriting, was found at Byatt's. That box was taken by Rogers to the railway office in Liverpool on the 13th of January, and booked as a parcel for London. Rogers was asked if he wished to pay the carriage; and he did so. The box was then forwarded in the ordinary manner. The box containing the articles named in the letter (and amongst them the stolen watch in question) was sent by railway in the same manner on the 30th of January, at ten o'clock in the morning; but the railway clerk could not say by whom it was brought to the office. It was proved that the watch in question was stolen from the owner at Liverpool on the 29th of January, about seven o'clock in the evening; and, when found at Byatt's, the bow of the watch had been broken off. Rogers was the keeper of a beershop at Liverpool; and there were found in his house a number of watch-keys, a jeweller's eye-glass, and jewellers' scales and weights. Being asked by the officer what such things were used for, he laughed, and said, "You know as well as I do."

No counsel appeared for the prisoner.

A. Collins, for the Crown. Under the 24 & 25 Vict. c. 96, s. 114(1), the Court had jurisdiction to try Rogers at the Middlesex sessions. The watch was in the possession of the railway company as innocent agents, and was therefore in the constructive possession of Rogers. In *Reg. v. Cryer* (2), the half of a country bank-note having been stolen at some period during its transit from Swindon, in Wiltshire, to Bristol, was afterwards enclosed by

(1) That section enacts that "if any person shall have in his possession in any one part of the United Kingdom any chattel, &c., which he shall have stolen, &c., in any other part of the United Kingdom, he may be dealt with, indicted, tried, and punished for larceny or theft in that part of the United Kingdom where he shall so have such property, in the same manner as if he had actually stolen or taken it in that part."

(2) *Dears. & B.*, C. C. 324; 26 L. J. (M.C.) 192.

1868
THE QUEEN
v.
ROGERS.

the prisoner in a letter addressed to the bankers at Swindon, demanding payment, and this letter was posted at Bath, and sent in due course of post to Swindon; and it was held that the prisoner was rightly tried in Wiltshire, as the possession in Wiltshire either of the post-office servants or of the bankers was his possession, and the case was therefore brought within the 7 & 8 Geo. 4, c. 29, s. 56, the statute then in force, which is similar in its terms to the 24 & 25 Vict. c. 96, s. 114.

KELLY, C.B. It appears that the watch was stolen at Liverpool, and forwarded by Rogers to Byatt in London. The question then arises, did the possession remain in Rogers? We think the authority quoted is conclusive to shew that the constructive possession, which is equivalent to the actual possession, remained in Rogers. I may add that we had arrived at the same conclusion, independently of any authority.

KEATING, J., PIGOTT, B., MONTAGUE SMITH and HANNEN, JJ., concurred.

Conviction affirmed.

Attorneys for the Crown: *C. & J. Allen & Son.*

END OF EASTER TERM.

CASES

DETERMINED BY THE

COURT FOR CROWN CASES RESERVED

IN

TRINITY TERM, XXXI VICTORIA.

THE QUEEN *v.* GLYDE.

Larceny—Lost Property.

1868

May 30.

The prisoner found a sovereign on a highway, believing at the time that it had been accidentally lost; but, nevertheless, with a knowledge that he was doing wrong, he at once determined to appropriate it, notwithstanding it should afterwards become known to him who the owner was. There was no evidence to shew that the prisoner believed he could ascertain who the true owner was at the time he found the sovereign :—

Held, on the authority of *Reg. v. Thurborn* (1 Den. C. C. 387; 18 L. J. (M.C.) 140), that the prisoner was not guilty of larceny.

The following case was stated by COCKBURN, C.J. :—

William Glyde was convicted before me, at the last assizes for the county of Sussex, on an indictment, in which he was charged with having stolen a sovereign, the property of Jane Austin. It appeared that, on the evening of the 16th of January last, the prosecutrix, being on her way from Robertsbridge to her home at Brightling, and having some money loose in her hand, had occasion, owing to the dirty state of a part of the road, to hold up her dress, and in doing so let fall a sovereign. It being then dark, she did not stop to look for the sovereign; but on the following morning she started to go to the spot, in the hope of finding the lost coin. In the meantime, the prisoner, coming from Robertsbridge towards Brightling, in company with a man named Hilder and his son, and seeing, at the spot where the pro-

1868
THE QUEEN
v.
GLYDE.

secutrix had dropped her sovereign, a sovereign lying in the road, picked it up and put it in his pocket, observing that it was a good sovereign, and would just make his week up. Proceeding onwards, the men soon afterwards met the prosecutrix, then on her way to the spot where the sovereign had been dropped. According to her statement, on meeting the men, she addressed Hilder, whom she knew, and asked, in the hearing of the prisoner, "if he had stumbled on a sovereign," stating that she had lost one and was going to look for it, to which inquiry Hilder answered in the negative. She was, however, contradicted by Hilder and his son, who were called as witnesses for the prosecution, as to any such conversation having taken place. But it was clear that the fact of the sovereign thus picked up by the prisoner being one which had been lost by the prosecutrix was speedily brought to the prisoner's knowledge. The fact of the prosecutrix having lost a sovereign, and of the prisoner having found one, having come to his master's ears, the master asked him if he had found a sovereign, to which he answered that he "was not bound to say." The master further asked, if he had not heard that Mrs. Austin had lost one, to which the prisoner made the same reply. On the master asking whether it would not be more honest to give the sovereign up to her, he answered that "he could just manage to live without honesty." Being asked by a police constable whether he remembered going up the Brightling road and picking up a sovereign, he answered, "I don't know that I did." On the officer saying, "I have been informed by witnesses that you did so; and, if you did, it did not belong to you—more particularly as you know to whom it belonged," the prisoner said he did not want to have anything more to say to the officer, and went into his house. On a subsequent occasion, however, he admitted to the same witness that he had picked up the sovereign. The witness Hilder also stated that the prisoner afterwards came to him, and asked him if he could say that he (prisoner) had picked up a sovereign, and on receiving an answer in the affirmative, said that if that was so he must go to and see the prosecutrix, who had applied to him several times about it.

In summing up to the jury on this state of facts, I told them that where property was cast away or abandoned, any one finding

and taking it acquired a right to it, which would be good even as against the former owner, if the latter should be minded to resume it, but that, when a thing was accidentally lost, the property was not divested, but remained in the owner who had lost it, and that such owner might recover it in an action against the finder. As to how far larceny might be committed by a person finding a thing accidentally lost, it depended on how far the party finding believed that the thing found had been abandoned by its owner or not; that, where the thing found was of no value, or of so small value that the finder was warranted in assuming that the owner had abandoned it, he would not be guilty of larceny in appropriating it; or if, not knowing, or not having the means of discovering, the owner, the finder, from the inferior value of the thing found, might fairly infer that the owner would not take the trouble to come forward and assert his right, so that practically there would be an abandonment, and so believing appropriated the thing found as virtually abandoned by the owner, he would not be guilty of larceny. So, although the value of the article might render it impossible in the first instance to presume abandonment by the owner, yet, if, from the fact of no owner coming forward within a sufficient time, the finder might reasonably infer that the owner had abandoned and given up the thing as lost, there would be no criminality in an appropriation of it by the latter. On the other hand, I pointed out that there were things as to which it could not be supposed that they had been intentionally abandoned, or the owner be supposed to have given up his property. Thus, for example, a purse of gold, or a pocket-book containing bank-notes, found in the road, could not possibly be supposed to have been intentionally placed there; or a diamond ornament, found outside the door of an assembly room, to have been intentionally dropped by the lady who had worn it; or a box or parcel left in a public conveyance or a hack cabriolet, to have been left with the intention of abandoning the property. In all these cases, as the property remained in the owner, and the presumption of abandonment was plainly negatived by the circumstances, a person finding such an article and appropriating it to himself with an intention of wronging the owner, if he knew who the owner was, or had the means of finding the owner—as where the name and address of

1868

THE QUEEN
v.
GLYDE.

1868

THE QUEEN
v.
GLYDE.

the owner were on the thing found—or had the means of ascertaining the owner, as in the case of a cabman who knew the house at which he had taken up or set down a person by whom an article must have been left in the carriage—would clearly be guilty of larceny. And, even where the finder did not know the owner, if the nature of the thing found precluded the presumption of abandonment, and gave every reason to suppose that the owner would come forward and assert his claim, and the finder nevertheless determined to appropriate the chattel and to keep it, though he should afterwards become aware who the owner was—this, too, if done with the intention of wrongfully depriving the unknown owner of property which the finder knew still to belong to him, would be larceny, provided such intention was contemporaneous with the original taking of possession. I told the jury that, while, to constitute larceny in appropriating an article thus found, there must be a guilty intention of taking that which was known to belong to some one else, and which the party appropriating knew he had no right to treat as his own, this intention might be gathered from the value of the article and, the other circumstances of the case, especially the conduct of the party accused as to concealment or otherwise. In this respect I told them they might properly take into account the conduct of the prisoner, in maintaining silence when he heard the question put by the prosecutrix to Hilder, if they believed that portion of her evidence; or, at all events, in refusing to say whether he had found a sovereign or not, and only acknowledging it when Hilder had told him he was prepared to speak to the fact. As the result of this reasoning, I left it to the jury to say whether the prisoner, on finding the sovereign, believed it to have been accidentally lost, and nevertheless with a knowledge that he was doing wrong, at once determined to appropriate it to himself, and to keep it, notwithstanding it should afterwards become known to him who the owner was; and I told the jury, if they were of that opinion, to find the prisoner guilty. But, inasmuch as there was nothing to shew that the prisoner, on appropriating the sovereign on finding it, had any reason to suppose that the owner would afterwards become known to him, I doubted whether an intention on his part of keeping it, even if the owner

should become known to him—he not believing that the latter event would come to pass—would amount to larceny. I therefore thought it right to take the opinion of this Court whether the conviction can be sustained on the facts I have stated.

1868
THE QUEEN
v.
GLYDE.

No counsel appeared for the prisoner.

Lumley Smith, for the Crown. The question is whether a person who picks up an article may be found guilty of larceny, although at the time he does not know, and has no means of knowing, who the owner is. There was evidence in this case to shew that the sovereign was not abandoned, although it was not specifically left to the jury to say whether the prisoner had the means of knowing who the owner was. In *Reg. v. Moore* (1), on an indictment for stealing a 10*l.* note found by the prisoner in his shop, he was convicted of larceny, although the jury found that at the time he picked it up he did not know, nor had he reasonable means of knowing, who the owner was. It must be admitted, however, that the jury also found, which they have not done here, that the prisoner believed, at the time he picked up the note, that the owner could be found, and that in that case the note was not really lost in the sense in which the sovereign was lost in this case.

[BLACKBURN, J. Can a man be held to be guilty of larceny where the original taking by finding is innocent? In *Reg. v. Moore* (1), Wightman, J., seems to say that three ingredients are necessary to constitute larceny: that the prisoner intended to appropriate the property from the first; that he believed, at the time he took it, that the owner could be found; and that he acquired the knowledge of who that owner was before he converted it to his own use.]

In *Reg. v. Thurborn* (2) it was held that, if a person find the chattel of another, and instantly appropriate it, *animo furandi*, that is, with the intent of usurping the entire dominion over it, but under such circumstances as to warrant a jury in finding that at the time of the appropriation he really believed that the owner could neither find the chattel nor be found himself, such appropriation is not larceny. In *Reg. v. Preston* (3), and *Reg. v. Christo-*

(1) *Leigh & Cave*, C. C. 1; 30 L. J. (M.C.) 77. (2) 1 Den. C. C. 387; 18 L. J. (M.C.) 140.

(3) 2 Den. C. C. 353; 21 L. J. (M.C.) 41.

1868
THE QUEEN
v.
GLYDE.

pher (1), the same principle was adopted. But it is submitted that this Court is not bound by *Reg. v. Thurborn* (2); and in the last edition of Russell on Crimes (3) the editor asserts that the judgment in that case "met with very general disapprobation among criminal lawyers, and has been often questioned since."

COCKBURN, C.J. This is not a case of larceny. In all cases of larceny of lost property, the question turns on what were the prisoner's grounds for believing that the goods were abandoned; and in this case, although the sovereign was accidentally lost, it was very doubtful whether the owner would come and claim it. If, indeed, the finder, although it was doubtful whether the property would be claimed, were on finding it to say, even if the owner does claim it, I mean to keep it, that might be larceny, although the rule in *Thurborn's Case* (2) does not go so far as that. But here we have no evidence to shew that the prisoner had reason to believe the true owner could be found; and therefore the case falls within the rule laid down in *Reg. v. Thurborn* (2), by which decision we are bound.

MARTIN, B. I very much doubt whether the principles laid down in *Thurborn's Case* (2) are right; but, as in *Reg. v. Christopher* (1), so also in this case we are bound by it.

BLACKBURN, J. I am not prepared to say that *Thurborn's Case* (2) is not law. At all events it stands unreversed; and we are bound by it. In this case there was no evidence to shew that the prisoner believed he could find the true owner when he picked up the sovereign.

WILLES, J., and BRAMWELL, B., concurred.

Conviction quashed.

Attorney for the Crown: *T. Philcox, Burwash.*

(1) Bell, C. C. 27; 28 L. J. (M.C.) 35.

(3) Vol. ii. p. 180, note (t), 4th ed.

(2) 1 Den. C. C. 387; 18 L. J. (M.C.) by Mr. Greaves.

THE QUEEN v. SHAW.

Lunatic—8 & 9 Vict. c. 100, ss. 90, 114.

1868

May 30.

Imbecility and loss of mental power, whether arising from natural decay or from paralysis, softening of the brain, or other natural cause, and although unaccompanied by frenzy or delusion of any kind, constitute unsoundness of mind amounting to lunacy within the meaning of the 8 & 9 Vict. c. 100.

THE following case was stated by COCKBURN, C.J. :—

Edward Charles Shaw was convicted before me at the last spring assizes for the county of Hertford, on an indictment under the 8 & 9 Vict. c. 100, s. 90, charging him with having taken charge of and received to board and lodge, in a house not being a duly registered hospital or licensed asylum, one John Clode, a lunatic or alleged lunatic; as also with having done so without the other conditions and formalities required by the statute having been complied with. All the facts necessary to support the indictment (assuming the said John Clode to have been a lunatic) were fully established. But a question arose whether the said John Clode was a lunatic within the meaning of the act, the term lunatic being by the interpretation clause declared to mean "every insane person, and every person being an idiot or lunatic, or of unsound mind." It appeared that Mr. Clode, a man of fifty-five years of age, having had, after indulging for some time in habits of intemperance, three attacks of paralysis, had been placed with the defendant, a medical man, not as a lunatic, but as an invalid, whose memory had become greatly impaired by bodily weakness and infirmity. It did not appear that he laboured under any delusions or mental aberration; neither was he subject to fits of frenzy or violence. But it was clear that his mental faculties had fallen into a state of exceeding weakness and imbecility, as will appear from the following facts:—He was insensible to the calls of nature, and utterly regardless of all cleanliness, and was satisfied to remain in a most revolting state of filthiness. It appeared that he had been visited, by order of the Lord Chancellor, by two physicians, Drs. Blandford and Bennett; thrice by the former, once by the latter. Dr. Blandford proved that on visiting defendant's establishment, on the 31st of October

1868

THE QUEEN

v.
SHAW.

last, he found Mr. Clode, at between six and half-past six in the afternoon, in bed, in a room about 12 feet square and 6½ feet high. He was lying on the remains of two old mattresses, covered over with a piece of old carpet, with no other bedclothes whatever, and without pillow or bolster. The mattresses, one of which was of flock, the other of straw, were soaked with fæces and urine, which was dripping through on to the floor, and were quite rotten. The walls of the room were filthy, having marks of fingers dirty with fæces having been smeared on them; as was also the case with a post which supported the ceiling. The smell in the room was, in the words of the witness, "most abominable." The room was without carpet of any sort. There was an old washstand with a basin and jug, but no water, soap, or towel. Not far from the bedstead was a heap of ashes, and on it two chamber utensils, one full of fæces. Mr. Clode's trousers were wet with urine; and a pair of drawers lying there were dirty with fæces. He was lying in a flannel shirt, the tail of which was gone. He was very wet with filth, as was the piece of carpet with which he had been covered. Emma Coughtree, a witness, proved that, since the month of May, she had been employed to clean out Mr. Clode's room once a week. His bed consisted of two rotten mattresses and a piece of old carpet and an old coat. There were no sheets or blankets. She stated that, on first going there, she had to remove a pail, as well as two chamber utensils, full of excrement, which was all flowing over on to the floor, while under the bed there was "quite a pond drained from the mattresses." It appeared that, after the first visit of Dr. Blandford, a slight improvement in the attention to the comforts of Mr. Clode took place. According to the evidence of the witness Emma Coughtree, on the 1st of November the two old mattresses were removed, and carried to a dunghill, having fallen to pieces from rottenness in the course of removal. A straw bed and palliase were substituted, and two straw pillows supplied. On the 25th of November, which was after the improvement just referred to had taken place, Mr. Clode was visited by Dr. Bennett. This witness stated that, having desired to see Mr. Clode's room, he was conducted to it by the defendant, but on entering the room the stench was so intolerable that he proceeded no further. Nevertheless, he saw Mr. Clode's bed, which he described as having

a very miserable, dirty-looking mattress on it. The room itself also looked miserable, and dirty. Chloride of lime had evidently been recently used; but, though the smell of it was very strong, it was not sufficient to overpower the stench of the room. It appeared that Mr. Clode was not dissatisfied with, and was probably insensible to, the disgusting state in which he was thus suffered to remain. He, indeed, said, in answer to a question from Dr. Blandford how he came to be in such a room, that it was in a very disgraceful state; but on being asked by Dr. Bennett on going to his apartment, whether he liked his room, he answered, "Yes;" and on being asked whether he was comfortable in it, answered, "Oh, very comfortable;" and on being further asked whether his bed was comfortable, his answer was, "Oh, very." This insensibility to filth in so revolting a form was strongly insisted upon by the two medical witnesses for the prosecution as a marked indication of the utter decay of the intellectual faculties of the patient. But there was also striking proof that Mr. Clode's mental faculties in general, and more especially his memory, had become very seriously impaired. According to the evidence of the medical witnesses, it was extremely difficult to fix his attention on any subject, or to get him to converse. "He did not seem," says Dr. Bennett, "to take interest in anything;" and he gave only "monosyllabic answers." He remembered, however, that he had lived in Park Street, Windsor, and, in his interview with Dr. Blandford, kept saying, "I'm John Clode of Windsor," in a silly way. "He remembered," says Dr. Bennett, "that he had taken part in elections for Windsor, but could not remember the names of the candidates, or on which side he had acted." On being asked if he had any family, he remembered he had a wife, and a daughter married; but on no occasion of his being visited by the medical witnesses could he remember, though frequently asked, the name of his daughter. Neither could he remember the name of the people with whom he was then living. When asked on each occasion how long he had been where he then was, his answer was "five months," though in fact he had been there as many years. This mistake he made twice during the same interview, though corrected by the defendant, who refused after the first interview with Dr. Blandford to allow the patient to be seen alone. When asked, on more than

1868

THE QUEEN

v.
SHAW.

1868

THE QUEEN
v.
SHAW.

one occasion, why he remained at the defendant's, his answer was "that he intended to leave next week, when the railway would be opened." Both Dr. Blandford and Dr. Bennett declared their positive opinion that there was decided unsoundness of mind in Mr. Clode in respect of the general decay of mental power, as well as of loss of memory and insensibility to the ordinary, instinctive repugnance to filth. They agreed that there was an absence of active dementia or morbid delusion, and ascribed the existing symptoms to a decay of the intellectual and moral faculties, whether proceeding from paralysis, softening of the brain, or any other cause from which such decay could arise. Two medical witnesses, called on behalf of the defendant, stated that there were no symptoms of insanity in Mr. Clode, and had given certificates to that effect; but one of them admitted that there was unsoundness of mind in respect of loss of memory arising from softening of the brain. I directed the jury, if they believed the evidence for the prosecution, to find the defendant guilty, which they accordingly did; and looking on the case as an aggravated one, in consequence of the neglect with which the patient had been treated—more especially as the defendant had insisted on having his pay doubled in consideration of extra comforts to be afforded—I sentenced the defendant to a fine of 100*l.* and six months' imprisonment; but, deeming it worthy of consideration whether imbecility and loss of mental power, arising either from natural decay or from paralysis, softening of the brain or other supervening cause, if unaccompanied by frenzy or delusion of any kind, constituted unsoundness of mind, so as to be lunacy within the meaning of the act on which this indictment was framed, I reserved that question for the decision of this Court. If the Court shall be of opinion that John Clode was a lunatic within the meaning of the 90th section of the 8 & 9 Vict. c. 100, the verdict is to stand; otherwise not.

Woollett (*E. F. Griffin* with him), for the defendant. There is no legal evidence to bring the defendant within the 90th section of the 8 & 9 Vict. c. 100. There is no evidence of any aberration of mind.

[BLACKBURN, J. The way in which the patient submitted to be kept was evidence of an unsound mind.]

It is necessary to go beyond that to render the defendant criminally liable; it is necessary to shew that he knew the man to be a lunatic, and that he received him as such.

Parry, Serjt. (Poland with him), for the Crown, was not called upon.

1868

THE QUEEN
v.
SHAW.

COCKBURN, C.J. What I meant to reserve was whether a state of imbecility, arising naturally from the gradual natural decay of the faculties, is lunacy within the statute. We are all of opinion that this case falls within the mischief contemplated by the act, and that the conviction ought to stand.

MARTIN, B., WILLES, J., BRAMWELL, B., and BLACKBURN, J. concurred.

Conviction affirmed.

Attorneys for the Crown: *Vandercom, Law, & Payne.*

Attorney for defendant: *Hembery.*

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END OF TRINITY TERM.

CASES

DETERMINED BY THE

COURT FOR CROWN CASES RESERVED

IN

MICHAELMAS TERM, XXXII VICTORIA.

THE QUEEN v. PRINCE.

1868
Nov. 14.

Larceny—False Pretences—Master and Servant—Effect of Distinction between General and Limited Authority of Servant.

Where a servant is entrusted with his master's property with a general authority to act for his master in his business, and is induced by fraud to part with his master's property, the person who is guilty of the fraud and so obtains the property, is guilty of obtaining it by false pretences, and not of larceny, because to constitute larceny there must be a taking against the will of the owner, or of the owner's servant duly authorized to act generally for the owner.

But where a servant has no such general authority from his master, but is merely entrusted with the possession of his goods for a special purpose, and is tricked out of that possession by fraud, the person who is guilty of the fraud and so obtains the property is guilty of larceny, because the servant has no authority to part with the property in the goods except to fulfil the special purpose for which they were entrusted to him.

The cashier of a bank is a servant having a general authority to conduct the business of the bank, and to part with its property on the presentation of a genuine order from a customer; and if he is deceived by a forged order, and parts with the money of the bank, he parts, intending so to do, with the property in the money, and the person knowingly presenting such forged order is guilty of obtaining the money by false pretences, and not of larceny.

THE following case was stated by the Common Serjeant:—

The prisoner was tried before me at the August session of the Central Criminal Court on an indictment charging him, in the first count, with stealing money to the amount of 100*l.*, the property of Henry Allen; in the second count, with receiving the

same, knowing it to have been stolen ; and in two other counts the ownership of the money was laid in the London and Westminster Bank.

1868
THE QUEEN
v.
PRINCE.

It appeared in evidence that the prosecutor, Henry Allen, had paid moneys amounting to 900*l.* into the London and Westminster Bank on a deposit account in his name, and on the 27th of April, 1868, that sum was standing to his credit at that bank. On that day the wife of Henry Allen presented at the bank a forged order purporting to be the order of the said Henry Allen for payment of the deposit, and the cashier at the bank, believing the authority to be genuine, paid to her the deposit and interest in eight bank-notes of 100*l.* each, and other notes. Among the notes of 100*l.* was one numbered 72,799, dated the 19th of November, 1867.

On the 1st of July, 1868, the wife of Henry Allen left him and his house, and she and the prisoner were shortly afterwards found on board a steamboat at Queenstown on its way from Liverpool to New York, passing as Mr. and Mrs. Prince, Mrs. Allen then having in her possession nearly all the remainder of the notes obtained from the bank. The note for 100*l.*, No. 72,799, was proved to have been paid away by the prisoner in payment for some sheep in May, 1868, and he said he had it from Mrs. Allen.

Upon this evidence it was objected by prisoner's counsel that the counts alleging the property to be in Henry Allen must fail, as the note had never been in his possession ; and that, as to the other counts, the evidence did not shew any larceny of the note from the bank by the wife, but rather an obtaining by forgery or false pretences by her, and that the receipt by the prisoner from her was not a receipt of stolen property. I held, however, that the forged order presented by the wife was, under the circumstances, a mere mode of committing a larceny against the London and Westminster Bank, and that the prisoner was liable to be convicted on the fourth count.

The jury found the prisoner guilty on that count, and I respited judgment, and reserved for the consideration of the Court the question whether the obtaining the note from the bank by Mrs. Allen, under the circumstances stated, was a larceny by her ; if not, the conviction must be reversed.

1868

THE QUEEN
v.
PRINCE.

Collins, for the prisoner. The conviction is for receiving a 100*l.* note stolen by Mrs. Allen from the London and Westminster Bank, but Mrs. Allen's conduct did not amount to stealing; it was an obtaining money by false pretences; for, first, the cashier had power to part with the property in, and possession of, the money of the bank; and, secondly, he did part with both as regards this note, believing the order presented to him to be genuine. In Story on Agency, s. 115, p. 118, 6th ed., the duties of cashiers are stated, and where payment is made to a bonâ fide holder on a forged order the payment cannot be recalled, for the cashier is bound to know the genuine paper of the bank: *United States Bank v. Bank of Georgia*. (1) Money had and received will not lie by a banker against a person who has received money of the bank through a cashier's mistake: *Chambers v. Müller*. (2) These cases shew that a cashier can part with his master's property, and divest his master of it. The cashier's duty is to decide on the genuineness of a cheque. If he decides wrongly, and pays money on a forged cheque, he still acts within the scope of his authority. Believing the cheque in question to be genuine, he intended to part with the property in the note, and he did so part with it to Mrs. Allen. The bank is identified with its cashier, and having voluntarily parted with its own money, and not merely with the possession of it, the act of Mrs. Allen is not larceny, because one of the material elements of that offence is absent, viz., a taking against the will of the owner. *Reg. v. Jackson* (3) is on all fours with this case. There the servant of a pawnbroker, who had a general authority from his master to act in his business, delivered up a pledge to the pawner of it, believing he was receiving in exchange a parcel of diamonds. The parcel contained worthless stones; but the servant having entirely parted with the pledge under a mistake, it was held that the pledger could not be convicted of larceny. *Reg. v. Adams* (4), *Reg. v. Atkinson* (5), are also in point. In 1 Hale's Pleas of the Crown, p. 506, it is said: "If A. comes to B., and by a false message or token receives money of him, and carries it away, it is no felony:" *Reg. v. Parks* (6);

(1) 10 Wheaton, 333.

(2) 32 L. J. (C.P.) 30.

(3) 1 Moo. C. C. 119.

(4) 1 Den. C. C. 38.

(5) 2 East, P. C. 673.

(6) 2 East, P. C. 671.

Reg. v. Barnes (1); *Reg. v. Essex*. (2) The cashier here did not merely part with the possession of the note; he parted with the property in it also. The prisoner might have been convicted of receiving property obtained by false pretences: 24 & 25 Vict. c. 96, s. 95. But he cannot be convicted under the indictment as it stands.

Poland, for the Crown. The cashier had no power to part with the property in the note. *Reg. v. Adams* (3) is not in point, because there the person who parted with the goods was the owner himself.

[BLACKBURN, J. The three cases which press most against you are *Reg. v. Jackson* (4), *Reg. v. Barnes* (1), and *Reg. v. Essex*. (2) Unless you can distinguish those cases, the present is decided by authority.]

It is impossible almost to distinguish those cases, but there are several other cases at variance with them. This case must be decided by deciding between conflicting authorities. In *Reg. v. Atkinson* (5), cited for the prisoner, the delivery was by the owner. *Reg. v. Jackson* (4) is difficult to distinguish; but the question in every case is, whether the person who parts with goods had authority to divest the owner of the property.

[BOVILL, C.J. The cashiers of a bank are the only persons authorized to part with the money of the bank. They have full authority to decide on the genuineness of any signature presented to them, and, if they believe it genuine, to pay over money accordingly.]

It is submitted that it makes no difference whether a cashier has to judge of a signature or not; at any rate, he has no authority to part with money improperly which is not his, but the bank's: *Rex v. Longstreeth*. (6)

[BLACKBURN, J. There the servant had no authority to deal with the property in the goods, but merely with the possession.]

A carrier, as a bailee, is responsible for property entrusted to him. Why should not his servant have the same extent of authority and the same discretion as a bank clerk?

(1) 2 Den. C. C. 59.

(2) *Dears. & B. C. C.* 371.

(3) 1 Den. C. C. 38.

(4) 1 Mood. C. C. 119.

(5) 2 East, P. C. 673.

1868

THE QUEEN
v.
PRINCE.

[LUSH, J. The property in the goods remained in the consignor.

BLACKBURN, J. The decision turned on the fact that the servant of the carrier had no general authority to part with the goods, while in *Reg. v. Jackson* (1) the pawnbroker's servant had such general authority.]

A servant can have no authority to part with goods improperly. Every servant must have a certain discretion given him, and if he exercises that discretion wrongly, and parts with goods, he parts with the possession, and not with the property: *Reg. v. Wilkins* (2); *Reg. v. Small* (3); *Reg. v. Stewars*. (4)

Collins was not called upon in reply.

BOVILL, C.J. I am of opinion that this conviction cannot be sustained. The distinction between larceny and false pretences is material. In larceny the taking must be against the will of the owner. That is of the essence of the offence. The cases cited by Mr. Collins on behalf of the prisoner are clear and distinct upon this point, shewing that the obtaining of property from its owner, or his servant absolutely authorized to deal with it, by false pretences will not amount to larceny. The cases cited on the other side are cases where the servant had only a limited authority from his master. Here, however, it seems to me that the bank clerk had a general authority to part with both the property in and possession of his master's money on receiving what he believed to be a genuine order, and that as he did so part with both the property in and possession of the note in question the offence committed by Mrs. Allen falls within the cases which make it a false pretence, and not a larceny, and therefore the prisoner cannot be convicted of knowingly receiving a stolen note.

CHANNELL, B. I am of the same opinion. The cases cited on one side and the other are distinguishable on the ground that in one class of cases the servant had a general authority to deal with his master's property, and in the other class merely a special or limited authority. If the bank clerk here had received a genuine order, he would have paid the money for his master, and parted

(1) 1 Mood. C. C. 119.

(2) 1 Leach, 520; 2 East, P. C. 673.

(3) 8 C. & P. 46.

(4) 1 Cox. C. C. 174.

with the property, and the transaction would have really been what it purported to be. If, however, the clerk makes a mistake as to the genuineness of a signature, nevertheless he has authority to decide that point; and if he pays money on a forged order, the property therein passes from the master, and cannot be said to have been stolen.

BYLES, J. I am of the same opinion. I would merely say that I ground my judgment purely on authority.

BLACKBURN, J. I also am of the same opinion. I must say I cannot but lament that the law now stands as it does. The distinction drawn between larceny and false pretences, one being made a felony and the other a misdemeanour—and yet the same punishment attached to each—seems to me, I must confess, unmeaning and mischievous. The distinction arose in former times, and I take it that it was then held in favour of life that in larceny the taking must be against the will of the owner, larceny then being a capital offence. However, as the law now stands, if the owner intended the property to pass, though he would not so have intended had he known the real facts, that is sufficient to prevent the offence of obtaining another's property from amounting to larceny; and where the servant has an authority co-equal with his master's, and parts with his master's property, such property cannot be said to be stolen, inasmuch as the servant intends to part with the property in it. If, however, the servant's authority is limited, then he can only part with the possession, and not with the property; if he is tricked out of the possession, the offence so committed will be larceny. In *Reg. v. Longstreeth* (1), the carrier's servant had no authority to part with the goods, except to the right consignee. His authority was not generally to act in his master's business, but limited in that way. The offence was in that case held to be larceny on that ground, and this distinguishes it from the pawnbroker's case (2), which the same judges, or at any rate some of them, had shortly before decided. There the servant, from whom the goods were obtained, had a general authority to act for his master, and the person who obtained the goods was held not to be guilty of larceny. So, in the

(1) 1 Moo. C. C. 137.

(2) *Reg. v. Jackson*, 1 Mood. C. C. 119.

1868

THE QUEEN
v.
PRINCE.

1868
THE QUEEN
v.
PRINCE.

present case, the cashier holds the money of the bank with a general authority from the bank to deal with it. He has authority to part with it on receiving what he believes to be a genuine order. Of the genuineness he is the judge; and if under a mistake he parts with money, he none the less intends to part with the property in it, and thus the offence is not, according to the cases, larceny, but an obtaining by false pretences. The distinction is inscrutable to my mind, but it exists in the cases. There is no statute enabling a count for larceny to be joined with one for false pretences; and as the prisoner was indicted for the felony, the conviction must be quashed.

LUSH, J. I also agree that the conviction must be quashed. I ground my judgment on the distinction between the cases which has been pointed out. The cashier is placed in the bank for the very purpose of parting with the money of the bank. He has a general authority to act for the bank, and therefore that which he does his masters, the bankers, do themselves through him.

Conviction quashed.

Attorneys for the Crown: *Paule, Lovesy, & Fearon; Roy & Cartwright.*

Attorney for prisoner: *E. Froggatt.*

Nov. 14.

THE QUEEN v. BARROW.

Rape—Woman's Consent obtained by Fraud.

Where a woman consents to the act of connection, even though her consent is obtained by fraud, the act does not amount to rape.

A woman while in bed with her husband permitted the prisoner, under the belief that he was her husband, to have connection with her:—

Held, that, in the absence of proof that she was asleep or unconscious at the time the act of connection commenced, it must be taken that her consent was obtained by fraud, and that the prisoner's act did not amount to rape.

THE following case was stated by Kelly, C.B.:—

This was an indictment for a rape. The question is whether the offence as proved amounted in point of law to a rape. This

question depended entirely upon the evidence of the prosecutrix, Harriet Geldart, which was as follows:—

"I and my husband lodge together at William Garner's. We sleep up stairs on the first floor, and were in bed together on the night of Saturday, the 21st of June. I went to bed about 12 o'clock, and about 2 o'clock on Sunday morning I was lying in bed, and my husband beside me. I had my baby in my arms, and was between waking and sleeping. I was completely awakened by a man having connection with me, and pushing the baby aside out of my arms. He was having connection with me at the moment when I completely awoke. I thought it was my husband, and it was while I could count five after I completely awoke before I found it was not my husband. A part of my dress was over my face, and I got it off, and he was moving away. As soon as I found it was not my husband, I pulled my husband's hair to wake him. The prisoner jumped off the bed."

On cross-examination she added, "Till I got my dress off my face I thought it was my husband. After he had finished I pulled the dress off my face. I was completely awakened by the man having connection with me and the baby being moved." On re-examination she said, "The baby was pushed on further into the bed."

The jury found this evidence, as I have stated it, to be true.

Upon these facts the prisoner's counsel, Mr. Cottingham, submitted that the indictment was not sustained, and quoted 1 Russell on Crimes, ed. of 1843, p. 677; *Rex v. Jackson* (1); *Reg. v. Saunders* (2); *Rex v. Williams* (3); *Reg. v. Camplin* (4). *Reg. v. Fletcher* (5) was also referred to.

I thought, especially on the authority of the judgment delivered by Lord Campbell in *Reg. v. Fletcher* (5), that the case was made out, inasmuch as it was sufficient that the act was done by force and without consent before or afterwards; that the act itself, coupled with the pushing aside the child, amounted to force; and there was certainly no consent before, and the reverse immediately

(1) Russ. & Ry. 487.

(2) 8 C. & P. 265.

(3) 8 C. & P. 286.

(4) 1 Den. C. C. 89.

(5) 8 Cox, C. C. 131.

1868

THE QUEEN
v.
BARROW.

1868 afterwards; but I reserved the point for the Court of Criminal Appeal.

THE QUEEN
v.
BARROW.

No counsel appeared on either side.

BOVILL, C.J. We have carefully considered the facts as stated in this case. It does not appear that the woman, upon whom the offence was alleged to have been committed, was asleep or unconscious at the time when the act of connection commenced. It must be taken, therefore, that the act was done with the consent of the prosecutrix, though that consent was obtained by fraud. It falls therefore within the class of cases which decide that, where consent is obtained by fraud, the act done does not amount to rape.

CHANNELL, B., BYLES, BLACKBURN and LUSH, JJ., concurred.

Conviction quashed.

Nov. 14.

THE QUEEN v. SHICKLE.

Larceny—Animals feræ naturæ—Young Partridges reared under a common hen.

Partridges, hatched and reared by a common hen, while they remain with her, and from their inability to escape are practically under the dominion and in the power of the owner of the hen, may be the subject of larceny, though the hen is not confined in a coop or otherwise, but allowed to wander with her brood about the premises of her owner.

Reg. v. Cory (10 Cox C. C. 23), followed.

THE following case was stated by Cockburn, C.J.:—

James Shickle was tried before me at the last assizes for the county of Suffolk on an indictment for larceny, for stealing eleven tame partridges.

There was no doubt that the prisoner had taken the birds *animo furandi*; but a question arose whether the birds in question could be the subject of larceny; and the prisoner having been convicted, I reserved the point for the consideration of the Court.

The birds in question had been reared from eggs which had been taken from the nest of a hen partridge, and which had been placed under a common hen. They were about three weeks old,

and could fly a little. The hen had at first been kept under a coop in the prosecutor's orchard, the young birds running in and out, as the brood of a hen so confined are wont to do. The coop had, however, been removed, and the hen set at liberty, but the young birds still remained about the place with the hen as her brood, and slept under her wings at night.

1868

 THE QUEEN
v.
SHICKLE.

It is well known that birds of a wild nature, reared under a common hen, when in the course of nature they no longer require the protection and assistance of the hen and leave her, betake themselves to the woods or fields, and after a short time differ in no respect from birds reared under a wild hen of their own species.

The birds in question were neither tame by nature nor reclaimed. If they could be said to be tame at all, it was only that their instinct led them during their age of helplessness to remain with the hen. On their attachment to the hen ceasing, the wild instincts of their nature would return, and would lead them to escape from the dominion and neighbourhood of man. On the other hand, from their instinctive attachment to the hen that had reared them, and from their inability to escape, they were practically in the power and dominion of the prosecutor. The question is, whether under the circumstances, there can be such property in birds of this description as can be the subject matter of larceny.

Douglas, for the prisoner. These birds are *feræ naturæ*, and unless reclaimed are not the subject of larceny. The case finds that they were not tame nor reclaimed, that they were restrained by their instinct only from betaking themselves to the woods or fields, not being confined in any way. They could not, therefore, be the subject of larceny.

No counsel appeared for the Crown.

BOVILL, C.J. I am of opinion that, upon the facts stated, the question asked of us must be answered in the affirmative, and that the conviction is right. The case states that "from their inability to escape, they were practically in the power and dominion of the prosecutor." That is sufficient to decide the point. In *Reg. v. Cory* (1) the law on the subject is very clearly laid down by my

1868

THE QUEEN
v.
SHICKLE.

Brother Channell. He there says, speaking of pheasants hatched under circumstances similar to those here: "These pheasants, having been hatched by hens, and reared in a coop, were tame pheasants at the time they were taken, whatever might be their destiny afterwards. Being thus, the prosecutor had such a property in them that they would become the subject of larceny, and the inquiry for stealing them would be of precisely the same nature as if the birds had been common fowls or any other poultry, the character of the birds in no way affecting the law of the case but only the question of identity." In that statement of the law we all concur. The question here is, were these birds the subject of property? They were so when first hatched, and they remained so at the time they were taken by the prisoner, though it might be that at a later period they would become wild and cease to have an owner. The prisoner therefore, was rightly convicted.

CHANNELL, B., concurred.

BYLES, J. I am of the same opinion. The usual cases of larceny of animals are those of animals which, being at first wild, have become tame and reclaimed. In this case the only difference is that the birds here are tame and have been so from their birth, though they may become wild at a future time.

BLACKBURN and LUSH, JJ., concurred.

Conviction affirmed. (1)

Attorney for prisoner: *T. Horrex, for W. Walpole, Bury St. Edmunds.*

(1) See also *Reg. v. Head*, 1 F. & F. 350.

THE QUEEN v. ANDERSON.

1868
Nov. 16.

Admiralty Jurisdiction—Manslaughter—International Law—Merchant Shipping Act (17 & 18 Vict. c. 104), s. 267.

The Admiralty jurisdiction of England extends over British vessels, not only when they are sailing on the high seas, but also when they are in the rivers of a foreign territory at a place below bridges, where the tide ebbs and flows, and where great ships go.

All seamen, whatever their nationality, serving on board British vessels, are amenable to the provisions of British law.

An American citizen, serving on board a British ship, caused the death of another American citizen, serving on board the same ship, under circumstances amounting to manslaughter, the ship at the time being in the river Garonne, within French territory, at a place below bridges where the tide ebbed and flowed and great ships went :—

Held, that the ship was within the Admiralty jurisdiction, and that the prisoner was rightly tried and convicted at the Central Criminal Court.

Quære, as to the effect of the Merchant Shipping Act (17 & 18 Vict. c. 104), s. 267.

THE following case was stated by Byles, J. :—

James Anderson, an American citizen, was indicted at the Central Criminal Court for murder on board a vessel belonging to the port of Yarmouth, in Nova Scotia; she was registered in London, and was sailing under the British flag. At the time of the offence committed the vessel was in the river Garonne, within the boundaries of the French empire, on her way up to Bordeaux, which city is by the course of the river about ninety miles from the open sea. The vessel had proceeded about half way up the river, and was at the time of the offence about 300 yards from the nearest shore; the river at that place being about half a mile wide. The tide flows up to the place and beyond it. No evidence was given whether the place was or was not within the limits of the port of Bordeaux. It was objected for the prisoner, that the offence having been committed within the empire of France, the vessel being a colonial vessel, and the prisoner an American citizen, the Court had no jurisdiction to try him.

I expressed an opinion unfavourable to the objection, but agreed to grant a case for the opinion of this Court.

The prisoner was convicted of manslaughter.

1868

THE QUEEN
v.
ANDERSON.

M. Williams, for the prisoner. The Court had no jurisdiction in this case because the prisoner was an American citizen, and in a foreign territory, at the time the offence was committed. The Admiralty authorities had no power to send the man back to England for trial.

[BOVILL, C.J. The case does not raise that point. The question in the case is, "Being here, could he be tried?"

BLACKBURN, J. *Sattler's Case* (1) decides that even if wrongly brought here, it makes no difference.]

The 267th section of the Merchant Shipping Act, 1854 (17 & 18 Vict. c. 104) (2), was relied on by the Crown at the trial. It has no application to this case because it applies only to British seamen, whereas the prisoner here was an American citizen. In *Lewis on Foreign Jurisdiction*, p. 25, it is said, "It seems that under this provision" (Merchant Shipping Act, 1854, s. 267), "a theft, or even a common assault, committed by a British seaman upon a native in a foreign port might be the subject of an indictment under the Admiralty jurisdiction in England. It is possible, however, that the very extensive terms of this enactment might receive some limitation from judicial interpretation." The author clearly thought the section must be limited to British subjects.

[BLACKBURN, J. The expression, British seaman, may mean one who, whatever his nationality, is serving on board a British ship.]

The section in question must be limited to British subjects. The legislature cannot legislate for the subjects of a foreign power. The 18 & 19 Vict. c. 91, s. 21, professes to legislate for offences

(1) D. & B. C. C. 525.

(2) 17 & 18 Vict. c. 104, s. 267 :—
"All offences against property or person committed in or at any place either ashore or afloat out of her Majesty's dominions by any master, seaman, or apprentice, who at the time when the offence is committed is or within three months previously has been employed in any British ship shall be deemed to be offences of the same nature respectively, and be liable to the same punishments respectively, and be inquired of,

heard, tried, determined, and adjudged in the same manner and by the same Courts and in the same places as if such offences had been committed within the jurisdiction of the Admiralty of England; and the costs and expenses of the prosecution of any such offence may be directed to be paid as in the case of costs and expenses of prosecutions for offences committed within the jurisdiction of the Admiralty of England."

committed on board ship on the high seas by those not British subjects. If the legislature could make such an enactment, still the place in question is not the high seas. It was within the empire of France.

1868

THE QUEEN
v.
ANDERSON.

[BLACKBURN, J. It has been decided that a ship, which bears a nation's flag, is to be treated as a part of the territory of that nation. A ship is a kind of floating island.]

If it floats into the territory of another nation, it would cease to be so, and the jurisdiction of the flag would then be excluded. This man might have been tried in France.

[BOVILL, C.J. Even if he might, why should not this country legislate to regulate the conduct of those on board its own vessels, so as to have concurrent jurisdiction? However it would seem from Ortolan, *Diplomatie de la Mer*, Book 2, ch. 13, pp. 269—271, 4th ed., that the French local authorities will not interfere with transactions on board foreign vessels. They repudiate jurisdiction in such cases.]

Section 267 of the Merchant Shipping Act, 1854, professes to give jurisdiction three months after a man has left the ship. Under that provision an alien, who had left a ship, and returned to his own country and committed a crime two months afterwards there, might be tried and punished here. That could never have been intended. This was not the high seas. It was French territory where the ship was sailing, and therefore our courts have no jurisdiction: *Reg. v. De Matlos* (1); *Reg. v. Depardo* (2); and *Reg. v. John Lewis* (3), were also referred to.

Poland (*Beasley* with him), for the Crown. The 267th section of the Merchant Shipping Act, 1854, is not relied on in support of this conviction. The word "British subject" applies to an alien who resides in this country. (4) This man is a British subject, as being subject to British law. In *Reg. v. Depardo* (2), no decision was given. The man was released, it is true, but he was an alien enemy. In that case there was no protection afforded by our law, and therefore he was not amenable to it. In *Reg. v. Matlos* (1) the offence was committed on land out of the United Kingdom, and the prisoner, a foreigner, had left the service of the ship. He had

(1) 7 C. & P. 458.

(2) 1 Taunt. 26.

(3) D. & B. C. C. 182.

(4) 1 Hale, P. C. 512.

1868
THE QUEEN
v.
ANDERSON.

ceased to be under British protection, and therefore ceased to be amenable to British law. The question here is, whether a person, killing another in a British ship afloat, is amenable to British law? A ship is a floating island, and it does not lose its character as such when in the river of another territory, but it still remains British, and subject to British law: *R. v. Jemot* (1); *Reg. v. Allen*. (2) Great inconvenience would ensue if that were not so. Crimes would frequently escape altogether unpunished. The French courts repudiate jurisdiction in the case of offences committed on board foreign merchant vessels by one member of the crew against another in French ports, unless the peace of the port is disturbed. They would take no cognizance of the offence in this case therefore: Wheaton's Int. Law (ed. 1864), pp. 202-3; Ortolan, *Diplomatie de la Mer*, Bk. 2, cap. 13, pp. 303-305, 3rd ed.; 269-271, 4th ed. Suppose the ship was in the waters of a savage country, if a person committing a crime could not be tried by the law of the ship, he would escape altogether: *United States v. Holmes*. (3) To give jurisdiction to the country to which a ship belongs, it is not necessary that the ship should be on the high seas at the time the crime is committed. It is sufficient if it be in tidal water, even though that water be in the body of another country, and where great ships go.

[BLACKBURN, J. The latter limitation is necessary, otherwise a foreign country might claim jurisdiction over a crime committed on a boat belonging to one of its vessels though as far up the Thames as Teddington.]

United States v. Willberger (4) seems to deny the jurisdiction of the nation to which the ship belongs when the ship is in the tidal river of a foreign power, but that case is opposed to *United States v. Coombs* (5), which shews that the jurisdiction exists in such cases. The true view of the law is, that if a British ship is in a foreign river, at a place where the tide ebbs and flows, and where great ships go, the jurisdiction of the Admiralty extends to her: *Thomas v. Lane*. (6) The struggle in former times was between the Common

(1) Old Bailey, 28th Feb. 1812,
MS. Cited 1 Russ. on Crimes, 4th ed.
p. 153, and Archbold's Crim. Plg.
16th ed. p. 395.

(2) 1 Mood. C. C. 494.

(3) 5 Wheat. 412.

(4) 5 Wheat. 76.

(5) 12 Peters. 72.

(6) 2 Sumner, 1.

Law courts and the Admiralty courts. If a crime was committed on a river in this country, then a conflict of jurisdiction arose; but if the ship is in a foreign river, if the Admiralty has no jurisdiction, no court has. The earliest statutes on the subject of Admiralty jurisdiction are 3 Rich. II. c. 3, and 15 Hen. VIII. c. 15, but those statutes were passed not to limit the jurisdiction, but to cure defects of venue in certain cases: 1 Kent's Comm. 10th ed. pp. 409, 410. The American courts hold that the large lakes and rivers of that country are within Admiralty jurisdiction: *Genesee Chief v. Fitzhugh*. (1) Even supposing that the country of the river had concurrent jurisdiction, that could not affect the question. The true test is, does the jurisdiction of the Admiralty extend to the place where the ship is sailing, i.e., is the ship on the high seas, or in a tidal river of a foreign power, where great ships go? It is submitted that the ship in question did not lose its character as a British ship, by floating within a league of French territory in a tidal river. Where the ship is in a foreign port, it loses its character as a ship: *United States v. Hamilton* (2); but it does not lose that character while in a river. The flag of the ship extends its protection over all on board, as long as the character of ship remains, and in return for that protection, every person on board owes allegiance to the law of the flag. The prisoner, therefore, was within Admiralty jurisdiction; he had the protection of the British flag, and was therefore amenable to British law.

M. Williams, in reply.

BOVILL, C.J. There is no doubt that the place where the offence was committed was within the territory of France, and that the prisoner was, therefore, subject to the laws of France, which that nation might enforce if they thought fit; but at the same time he was also within a British merchant vessel, on board that vessel as a part of the crew, and, as such, he must be taken to have been under the protection of the British law, and also amenable to its provisions. It is said that the prisoner was an American citizen, but he had embarked by his own consent on board a British ship, and was at the time a portion of its crew. There are many observations to be found in various writers to shew that in some instances,

1868

THE QUEEN
v.
ANDERSON.

(1) 12 Howard, 443.

(2) 1 Mason, 152.

1868

THE QUEEN
v
ANDERSON.

though subject to American law as a citizen of America, and to the law of France as being found within French territory, yet that he must also be considered as being within British jurisdiction as forming a part of the crew of a British vessel, upon the principle, that the jurisdiction of a country is preserved over its vessels, though they may be in ports or rivers belonging to another nation. With respect to France, M. Ortolan in his work (1) says, that it is clear, that with regard to merchant vessels of foreign countries, the French nation do not assert their police law against the crews of those vessels, unless the aid of the French authority be invoked by those on board, or unless the offence committed leads to some disturbance in their ports. The law of France is very clear on this point. Amongst the instances mentioned are two cases of American vessels, one being in the port of Antwerp, and the other in the port of Marseilles, where, offences being committed on board, the Americans claimed the exclusive jurisdiction over their vessels; though being in foreign ports, they were vessels belonging to America. As far as America is concerned, she has by statute made regulations for those on board her vessels in foreign ports, and we have adopted the same course in this country. When vessels go into a foreign port they must respect the laws of that nation to which the port belongs; but they must also respect the laws of the nation to which the vessel belongs. When our vessels go into foreign countries we have the right, even if we are not bound, to make such laws as to prevent disturbance in foreign ports, and it is the right of every nation, which sends ships to foreign countries, to make such laws and regulations. In the present case, if it were necessary to decide the question upon the Merchant Shipping Act, I should have no hesitation in saying that we have the power to legislate for those persons who place themselves under allegiance to us by becoming a portion of a British crew, and there would be no inconsistency in including foreigners in such legislation. What is the effect of the Merchant Shipping Act it is not necessary now to decide, and therefore I do not feel it necessary to enter into the question, for the Common Law of England, independently of the statute, is in my judgment sufficient to decide this case. Here the offence is committed on board a British vessel

(1) *Diplomatie de la Mer*, Book 2, ch. 13, pp. 269.—271, 4th ed.

by one of her crew. If this offence had been committed upon the high seas, there could have been no doubt upon the question either on principle or authority, and the offence then would have been committed clearly within the jurisdiction of the Admiralty, and therefore the Central Criminal Court would have stood in the same position as if the offence had been committed within its jurisdiction on land. Then, is the case different because the offence was committed when the vessel was lying in the Bordeaux river, some miles from its mouth, and not in the open sea? The place where the vessel was lying was in a navigable river, in a broad part of it below all bridges, and at a point where the tide ebbs and flows and where great ships lie and hover. What difference is there between such a place and the high seas? The cases that have been cited clearly shew that the Admiralty has jurisdiction in such a place; if so, the case stands precisely the same as if the offence had been committed upon the high seas. On the whole, I have come clearly to the conclusion that the prisoner is amenable to British law, and that the conviction is right.

1868

THE QUEEN
v.
ANDERSON.

CHANNELL, B. I am of opinion that the conviction is right. The 267th section of 17 & 18 Vict. c. 104, has been referred to, especially by the counsel for the prisoner. I agree, however, with the view put forward by Mr. Poland, that it is not necessary to pray that section in aid, in order to support this conviction. I say that it is not necessary, because I especially wish to guard myself from saying that such a case may not fall within the statute whenever the point arises. I agree in thinking this Court must execute and exercise the power which is given by any English act of parliament, but I express no opinion as to whether the words used in that section are such as to cover the present case. In construing a statute of this kind we are at liberty to ascertain as near as we can, what the international law on the point is, and construe the words of the statute in harmony therewith. I agree, however, with my Lord Chief Justice, that that point does not arise; when it does, it will be time to consider it. The ground of decision in my opinion is that the ship in question was within the Admiralty jurisdiction at the time the offence was committed, and that that of itself is sufficient to support the conviction. It may

1868
THE QUEEN
v.
ANDERSON.

not be however that the ship was at the time on the high seas, but she was within the Admiralty jurisdiction. I come to that opinion from the views expressed by various text-writers, and from the authority of the case of *Reg. v. Allen* (1), and the American case of *Thomas v. Lane*. (2) There may be some difficulty in dealing with the case of *United States v. Willberger* (3), but it does not seem to me to be altogether conflicting.

BYLES, J. I retain the opinion I expressed at the trial. I told the jury that the ship being a British ship was, under the circumstances, a floating island, where the British law prevailed; that the prisoner, though an alien, enjoyed the protection of the British law, and was as much subject to its sanctions, as if he had been in the Isle of Wight. Two English cases, *Reg. v. Allen* (1), and *Reg. v. Jemot* (4), and two American cases, *Thomas v. Lane* (2) and *United States v. Coombs* (5), have decided that in a river like the Garonne, within the flux and reflux of the tide, and where great ships go, a ship is within the Admiralty jurisdiction of the country to which she belongs. The only consequence of the ship being within the ambit of French territory, is that, (the vessel not being an armed vessel) there might have been concurrent jurisdiction, had the French law claimed it. If the murder had been committed on shore, and it had become necessary to consider the international effect of the Merchant Shipping Acts, I should have required further time for consideration.

BLACKBURN, J. I am also of opinion that the prisoner was rightly convicted, and that it is not necessary to consider the effect of the 267th section of the Merchant Shipping Act, 1854. There are numerous cases which shew that where English law would have had jurisdiction over a prisoner, the matter of venue is cured by statutes passed for the removal of technical rules, and that he could properly be tried in the Central Criminal Court. Then the question arises, had any of the Queen's courts jurisdiction at all

(1) 1 Mood. C. C. 494.

(2) 2 Sumner, 1.

(3) 5 Wheat. 76.

(4) Old Bailey, 28th Feb. 1812, MS.

1 Russ. on Crimes, 4th ed. 153; Archbold's Crim. Plg. 16th ed. p. 395.

(5) 12 Peters, 72.

to try the prisoner? If any, the Central Criminal Court had. There are a vast number of cases which decide that when a ship is sailing on the high seas, and bearing the flag of a particular nation, the ship forms a part of that nation's country, and all persons on board of her may be considered as within the jurisdiction of that nation whose flag is flying on the ship, in the same manner as if they were within the territory of that nation. The question now is, is the *Garonne* at the place in question to be considered the high seas? The term "high seas" has had various meanings attached to it, but from the earliest times in this country the Maritime Court has had jurisdiction over what happens on the common ground of nations, and, further than this, from the earliest times in England, and I think abroad also, it has been established that the jurisdiction of the Admiralty extends over vessels, not only when they are in the open sea, but also when in places where great ships do generally go. In the present case the ship had gone some miles up the *Garonne*, and it may be that she was in French territory, so as to give the French courts jurisdiction, had they chosen to exercise it; but not only have the French courts not exercised jurisdiction in this case, or in such like cases, but, as I understand, they have absolutely repudiated any such jurisdiction. Then the question is, has England jurisdiction over an English vessel in such a place, or would there be jurisdiction in the United States over an American ship which happened to be there? There seems to be no doubt that at a place where the tide flows, and below all bridges, the Admiralty assumes to have jurisdiction at common law. I pass by the law as laid down in *Hale's Pleas of the Crown*, for it seems to me that the modern cases of *Reg. v. Jemot* (1) and *Reg. v. Allen* (2) are those most closely in point. Those were both cases of crimes committed on board British ships at a time when they were lying, not in the open sea, but at some distance up a Chinese river. Each of these cases was held to be within the Admiralty jurisdiction, and consequently within that of the Central Criminal Court. In the American case of *United States v. Wiltberger* (3) the Court seems

1868

 THE QUEEN
 v.
 ANDERSON.

(1) Old Bailey, 28th Feb. 1812, ed. 153; and Archbold's Crim. Plg. 16th M.S. Cited 1 Russ. on Crimes, 4th ed. p. 395.

(2) 1 Mood. C. C. 494.

(3) 5 Wheat. 76.

1868

THE QUEEN
v.
ANDERSON.

to have held as a fact that the ship was out of the Admiralty jurisdiction, but in *Thomas v. Lane* (1) and *United States v. Coombs* (2) they give the grounds of their decision, not in conformity with the *United States v. Willberger* (3), but very much in conformity with the English decisions, and therefore I consider that the American courts would agree with us that the Admiralty jurisdiction would extend to this place; and so, just as an American seaman on board an American ship at the place in question would have been triable in America, so a foreign subject serving on board a British ship can be tried here. The difficulty as to the statute legislating for those out of the scope of its authority we must deal with when it arises. As a general rule, no doubt, we should construe a British statute according to the principles of international law, and should confine a legislative enactment to a British subject, or to a person subject to British protection. However, as long as the ship is at sea, we have no need of the statute. If the offence had been committed on land, or in harbour, it might become a question as to the construction of the statute. My present impression, however, is, that where a ship is sailing under a particular flag, the flag affords protection to all who sail under it, and the nation to which the flag belongs has a perfect right to legislate for all those on board, because she affords them that protection. Where a nation allows a vessel to sail under her flag, and the crew have the protection of that flag, common sense and justice require that they should be punishable by the law of the flag, and the 267th section of the Merchant Shipping Act, 1854, might properly be construed to mean that. The latter part of the section, where the three months' clause is introduced, affords more difficulty, but that point does not now arise. The one and only point decided in the present case is, that under the circumstances, the ship being within the jurisdiction of the Admiralty, the prisoner was properly tried at the Central Criminal Court.

LUSH, J. I also think that it is not necessary to resort to the Merchant Shipping Act, 1854, and therefore I offer no opinion upon its construction. I concur in the judgment of the rest of the Court upon the ground, that at the time the offence was committed, the

(1) 2 Sumner, 1.

(2) 12 Peters, 72.

(3) 5 Wheat. 76.

vessel was in a tidal river and within the flux and reflux of the tide, and, not being within the body of a county, was within the jurisdiction of the Admiralty. The prisoner was therefore properly convicted at the Central Criminal Court.

1868
THE QUEEN
v.
ANDERSON.

Conviction affirmed.

Attorney for the Crown: *The Solicitor to the Treasury.*

Attorneys for prisoner: *Senior, Attree, & Johnson.*

END OF MICHAELMAS TERM, 1868.

CASES

DETERMINED BY THE

COURT FOR CROWN CASES RESERVED

IN

HILARY TERM, XXXII VICTORIA.

1869

Jan. 23.

THE QUEEN v. FIRTH.

Larceny—Continuous Taking—Abstraction of Gas.

A. stole gas for the use of a manufactory by means of a pipe which drew off the gas from the main without allowing it to pass through the meter. The gas from this pipe was burnt every day, and turned off at night. The pipe was never closed at its junction with the main, and consequently always remained full of gas :—

Held, that as the pipe always remained full, there was, in fact, a continuous taking of the gas, and not a series of separate takings; but

Held, further, that, even if the pipe had not been thus kept full, the taking would have been continuous, as it was substantially all one transaction.

CASE stated by the Chairman of Quarter Sessions for the West Riding of Yorkshire.

John Firth was tried at the quarter sessions for the West Riding of Yorkshire at Wakefield on the 17th of August, 1868, on an indictment which charged that he stole 1000 cubic feet of gas the property of the mayor, &c., of the borough of Halifax. The offence was alleged to have been committed on the 30th day of April, 1866.

The corporation of Halifax are the owners of gas works within the borough, and a firm of S. and J. Firth, worsted manufacturers, had for some years been the occupiers of Lily Lane Mill in Halifax, which was lighted with gas supplied by the corporation

by meter. The prisoner was the son of S. Firth ; and, though not a partner, was employed by his father and took an active part in the management of the business.

1869

THE QUEEN
v.
FIRTH.

The case then stated evidence which showed that the prisoner had for several years supplied a portion of the manufactory with gas, which he abstracted from a main gas-pipe of the corporation of Halifax by means of a pipe which drew off the gas from the main without allowing it to pass through the meter in the manufactory. The gas thus obtained was burnt during the day at a large number of burners, and was turned off at night. There was no means of closing the entrance from the pipe into the main, and the pipe in consequence always remained full of gas. The gas was turned off by turning the cocks at the burners. No further evidence was given of any specific taking of gas by the prisoner.

At the close of the case for the prosecution it was objected by the prisoner's counsel, that if the taking of the gas amounted to larceny, the case for the prosecution proved a separate and distinct act of larceny committed almost daily during a period of several years. That the prisoner could not be called on to answer such a case on one indictment, and that the prosecution must confine their charge (1) to, and the case go to the jury on, one or any number of separate takings of the gas not exceeding three, by or under the orders of the prisoner, within a period of six calendar months from the first to the last of such takings.

The chairman overruled the objection, but reserved the point for the Court of Criminal Appeals.

The prisoner was convicted and liberated on bail.

The question submitted to the Court was, whether the conviction under the circumstances above stated was according to law.

(1) The case in fact stated that the objection was, "that the prosecution must confine their *evidence* to, and the case go to the jury on, one or any number," &c., &c. It was conceded by *Manisty* that this objection could not be sustained as stated, inasmuch as a number of successive takings might be shewn in order to establish the felonious intent of one specified taking. *Atkinson* stated that he was present at

the trial, and that the objection was then distinctly taken, that the prosecution should be required to elect upon which takings, not exceeding three within six months, they would proceed.

The Court then allowed the argument to proceed on the question, whether the charge in the indictment ought to have been restricted to specific takings by the prisoner, not exceeding three within six months.

1869

THE QUEEN
v.
FIRTH.

The case was argued before Bovill, C.J., Channell and Pigott, BB., Byles and Lush, JJ.

Manisty, Q.C. (*Serjt. Atkinson* and *Forbes* with him), for the prisoner. There was a series of takings of gas, not one continuous act, and the chairman should have directed that the prosecution should be confined to specific takings not exceeding three, under s. 6 of 24 & 25 Vict. c. 96; otherwise the prisoner, if indicted again for the same offence, might find it impossible to defend himself, as he would not know for what act he had been convicted. There was clearly a succession of takings, from the very nature of the acts. The fact that the prisoner took gas on one day does not shew that he took it on the next day, when he may have been absent from the manufactory.

[BOVILL, C.J. In *Reg. v. Bleasdale* (1), where there was an indictment for stealing coal from a mine during a long period of time, the words of Erle, J., are (2): "As long as coal was gotten from one shaft it was one continuous taking, though the working was carried on by means of different levels and cuttings, and into the lands of different people."]

There is a distinction between that case and the present. Here the gas which was taken last was not in existence when the takings commenced, and it cannot therefore be said that the gas taken at those two points of time was taken by one act.

[BOVILL, C.J. In *Reg. v. Shepherd* (3) it was held, on an indictment under s. 32 of 24 & 25 Vict. c. 96, that in calculating whether injury to the amount of 5*l.* had been caused to trees, the damage done to several trees might be added together if the acts causing such damage were substantially one continuous transaction.]

Maule, Q.C. (with him *Hannay*), for the prosecution. Authorities are not of much value in determining a point like this. Each case must be regarded with reference to its own nature and all the surrounding circumstances. There was here a continuous flow of gas from the main as long as the decoy pipe remained. There was, therefore, a continuous taking. The fact that the gas was being made from day to day does not affect the question. If water were abstracted from waterworks by a pipe open for a year, there

(1) 2 C. & K. 765.

(2) 2 C. & K. at p. 767.

(3) *Ante*, p. 118.

would be a continuous taking, although the water last taken might not have fallen from the clouds when the abstraction commenced.

[He was stopped by the Court.]

Manisty, in reply.

1869
THE QUEEN
v.
FIRTH.

BOVILL, C.J. [after referring to the form of the objection, and the statement of Serjeant Atkinson (1)]:—The real question in this case is, whether there was a series of takings during the whole number of years during which the gas was used, or whether there was only one continuous taking. Formerly it was necessary that there should be a separate indictment for each act of larceny. The last statute (2), following the principle of a former one (3), allows three different takings to be proved and to be left to the jury. But the only difference caused by this statute is, that three different acts may now be proved on one indictment for larceny, instead of, as formerly, only one. The law which decides whether there are several acts or only one act is the same as before that statute. Before the act is applicable it must be established that there were takings at different times, which can be so calculated that it may be shewn that there is six months from the first to the last of such takings. It is only in these cases that any question arises about election. Before the act, if the taking were continuous, there was only one taking; if there were several takings, the prisoner could only be convicted on one of them. *Reg. v. Bleasdale* (4) is a clear authority on this point. The fact that the statute allows three takings to be proved on one indictment does not alter the application of the case to the present law. In that case the prisoner was indicted for stealing coal from the mines of a number of different landowners. The taking of the coal had continued for a number of years, and all the coal was taken through one shaft. It was objected for the prisoner, that there were a number of different takings, and that the charge should be restricted to one specified act. Erle, J., as a matter of convenience, confined the charge to the taking from one owner, but he held that the whole taking was one continuous act.

There is also *Reg. v. Shepherd* (5), where the question was,

(1) See ante note (1) p. 173.

(3) 14 & 15 Vict. c. 100, s. 16.

(2) 24 & 25 Vict. c. 96, s. 6.

(4) 2 C. & K. 765.

(5) Ante, p. 118.

1869
THE QUEEN
v.
FIRTH.

whether damage done by the prisoner to a number of trees could be considered as one single act. It was left to the jury, who found that the act was continuous. The prisoner was convicted, and the conviction was affirmed.

These are authorities for holding that the taking in the present case was one continuous act. This causes no hardship to the prisoner, but is the view that is most favourable to him, as he cannot now be again indicted for taking any of this gas.

This view would dispose of the case, if there were no taking except when the gas was burnt; but really this difficulty does not arise here, because the opening from the main to the pipe was never closed, and the taking was, therefore, in fact continuous. This being so, there is no difficulty in the case; but even if it had not been so, the taking would have been continuous. Many instances might be given besides those already mentioned. Take the case of a granary at a railway station, and a man bringing two waggons close to the granary, and taking sacks from time to time, and extending this taking over four or five days. Here there would be different takings at different times, but it would be impossible to treat the taking otherwise than as one continuous act. Another case might be suggested, of a man at work in a house, stealing, on different days, out of different rooms, and taking one article out of one room, and another out of another, at intervals of a quarter of an hour, or an hour, or longer, all during the same job of work. I should rather suppose that this would be one continuous act, and might be included in one indictment. On principle, therefore, and on authority, I think the conviction was right; and the appeal must be dismissed.

Conviction affirmed.

Attorneys for prosecution: *Williamson & Hill, for Norris, Town Clerk, Halifax.*

Attorney for prisoner: *E. W. Le Riche, for Wavell & Co., Halifax.*

THE QUEEN v. TYREE.

1869

Jan. 23.

*Embezzlement—"Clerk or Servant"—Treasurer of Friendly Society—24 & 25
Vict. c. 96, s. 68.*

A. was treasurer of a friendly society, whose rules directed that all the moneys of the society should be paid to the treasurer, and that he should make no payments except on an order signed by the secretary, and countersigned by the chairman, or a trustee, and that he should give security. By another rule, all the moneys of the society were vested in trustees. A. was a member of the society, but received no payment for filling the office of treasurer:—

Held, on an indictment against A, as clerk and servant of the trustees of the society, for embezzling money which he had received as treasurer, that A. was not the "clerk or servant" of the trustees within s. 68 of 24 & 25 Vict. c. 96.

CASE stated by the Assistant-Judge of the Middlesex sessions.

William Tyree was tried at the Middlesex sessions on the 6th of January, 1869, on an indictment which charged that he was employed in the capacity of a clerk and servant to S. Young and others, and whilst so employed received 186*l.* 5*s.* on the account of S. Young and others, and that he embezzled the said money.

The prisoner was prosecuted at the instance of the trustees of a society called The Weymouth Lodge Friends of Labour Loan Society, which had been duly enrolled, and the rules of which had been duly certified by the barrister appointed to certify the rules of savings banks. The prisoner had for two years filled the office of treasurer, and by one of the society's rules the duties of that office were defined as follows:—"That a treasurer shall be appointed, into whose hands all money received on meeting nights, as well as all other money received for or on behalf of this society, shall be paid, and for which he shall sign a proper receipt. He shall be responsible for all money paid to him by the cashier, or any other person for or on behalf of this society. He shall pay no money for or on behalf of this society except by an order signed by the secretary, and countersigned by the chairman or a trustee. He shall give proper securities for the faithful execution of such office or trust, pursuant to the 3 & 4 Vict. c. 110, s. 12, in a bond of 100*l.*" By another rule all moneys of the society were vested in trustees, of whom S. Young was one. The prisoner was a member of the society, but received no salary or payment as treasurer, nor

1869
THE QUEEN
v.
TYRER.

were there any fixed periods for his accounting for the moneys received and paid by him. In June, 1868, the prisoner was called upon by the trustees of the society to produce his accounts, and they were examined by an auditor. It appeared that during his office the prisoner had received on account of the society 10,638*l.*, and that he had disbursed 10,448*l.*, leaving to be accounted for 180*l.*, or thereabouts. On being required to pay over this sum, he disputed the accuracy of the demand, and stated that his deficiency did not amount to more than 126*l.* As, however, he did not make any payment whatever, the present charge was preferred.

The assistant-judge doubted whether the prisoner could be considered as a clerk or servant, so as to make him amenable for the crime of embezzlement, but, on the authority of *Reg. v. Murphy* (1), he reserved that question, and took the opinion of the jury upon the facts, directing them to find a verdict of guilty if they were satisfied that the prisoner had failed to pay over the money received by him on account of the society, and had knowingly applied such money to his own purposes. The jury found the prisoner guilty, and judgment was respited.

The question submitted to the Court was, whether the prisoner was a clerk or servant or acting in the capacity of a clerk or servant to the trustees of the society, so as to make him, by his misappropriation of the money received by him as treasurer, liable to be convicted of the crime of embezzlement.

The case was argued before Bovill, C.J., Channell and Pigott, BB., Byles and Lush, JJ.

Ribton, for the prisoner. There are several points of law in the prisoner's favour which appear on the face of the case, although they are not formally submitted for the opinion of the Court.

[BOVILL, C.J. We can only decide those points which are reserved for our opinion. That is, in this case, whether the prisoner was "clerk or servant" to the trustees of the society.]

The prisoner was not a clerk or servant, but rather in the position of a banker to the society. His duty was to honour cheques of the society duly drawn. All those circumstances which are

(1) 4 Cox, C. C. 101.

usually relied on to prove that a person is clerk or servant to another are wanting here. The prisoner was not appointed by the trustees. He was not paid by them, or by any one else. They had no power over the prisoner. They could not direct him to act in any particular manner. He was not even bound to receive any money at all for the society; but, having received it, he held it as their banker. *Reg. v. Murphy* (1), which is relied on for the prosecution, is very different from the present case. There the prisoner was clerk in fact to the society, was paid as such, and received money for the society in that capacity.

[BYLES, J. If the prisoner in this case spent the money he received for the society, and was yet ready to account when the time came, would he be guilty of embezzlement?]

Clearly not. He was not bound to pay over the very coin that he received.

Metcalfe, for the prosecution. The question turns wholly upon the Friendly Societies Act, 18 & 19 Vict. c. 63. Section 18 vests all money and other property in the trustees of the society. By s. 19, the trustees are entitled to bring and defend all suits and prosecutions concerning the rights of the society. By s. 21, the treasurer must give security for the faithful execution of his office. By s. 22 (2) the treasurer is required to account to the trustees. It is not necessary to shew that *Reg. v. Murphy* (1) governs this case, because the statute makes the prisoner the servant of the trustees. He was bound to account, and he did not account.

[BOVILL, C.J. Was he bound to return the money itself, or an equivalent amount?]

Probably he was only bound to return an equivalent amount.

(1) 4 Cox, C. C. 101.

(2) 18 & 19 Vict. c. 63, s. 22:—
“Every treasurer . . . upon being required so to do by the trustees of such society . . . within seven days after such requisition shall render to the trustees of the society . . . a just and true account of all moneys received and paid by him since he last rendered the like account, and of the balance then remaining in his hands . . . which account the trus-

tees shall cause to be audited . . . and such treasurer, if thereunto required, upon the said account being audited, shall forthwith hand over to the trustees the balance which on such audit shall appear to be due from him,” and if he fail to pay, the trustees may sue upon the bond given as his security, and may sue him in any court of law for such balance.

1869

THE QUEEN
v.
TYRRE.

[BOVILL, C.J. Then what becomes of the charge of embezzlement? Is there any case in which the treasurer of a friendly society has been indicted as a clerk or servant?]

There is no case precisely in point, but in *Rez v. Jenson* (1) it was held that the clerk of a savings bank was guilty of embezzlement, as clerk to the trustees, although he was appointed by the managers. In *Rez v. Hall* (2), and in *Reg. v. Proud* (3), the secretary of a society was held, on an indictment for embezzlement, to be the clerk of the trustees.

BOVILL, C.J. We are all of opinion that the conviction cannot be sustained. *Reg. v. Murphy* (4), which at first sight appears in favour of the prosecution, is no authority for a conviction in the present case. Here the prisoner was treasurer, having certain duties clearly pointed out by an act of parliament and certain rules. In *Murphy's* case the prisoner was not treasurer, and there was no treasurer nor any rule that there should be one. The clerk therefore received the moneys of the society, and in making out his accounts credited himself with a portion of the money as remuneration for executing the office of secretary. The case states that there was no distinction between the office of secretary and treasurer (5), and it is material in considering this case to examine what was the defence set up by the prisoner. He urged (5), first, that having fairly accounted, and not having denied the receipt of the money, the offence only amounted to a breach of trust; 2ndly, that as he was a member of the society he could not be guilty of embezzling its moneys; 3rdly, that he had received the moneys as treasurer, for which office he received no remuneration. What he contended was not that he was not clerk, but that he had received the money as treasurer and not as clerk. His own counsel says (6), "The office of treasurer is not in the rules at all; the secretary is alone named. When the prisoner admitted the balance in his hands as secretary, and a trust was placed in him to keep it until distribution, he no longer held it as servant to the society." The argument was, that although *Murphy* was clerk at first, he was not so after

(1) 1 Moody, 434.

(2) 1 Moody, 474.

(3) Leigh & Cave, 97.

(4) 4 Cox, C. C. 101.

(5) 4 Cox, C. C. at p. 103.

(6) 4 Cox, C. C. at p. 105.

he had accounted as he then became treasurer. In the argument for the prosecution, it was urged that he continued to be servant all along, and never occupied the position of treasurer; and Lefroy, B., said during the argument (1), "the difficulty I feel is this, whether the prisoner . . . stood in the capacity of clerk or servant at all to the trustees, taking it to be his duty to collect the subscriptions, to account for them, and to keep them safe. If doing this constitutes him a servant, . . . I cannot distinguish the case of any banker, agent, or receiver." Blackburn, J., says (2), "It is immaterial to consider whether the prisoner filled the office of secretary or treasurer, or both, because it appears he was employed to collect the subscriptions, and that on the face of his account a balance appeared in his hands, and it was his duty to keep any surplus and have it ready for distribution when he should be required so to do. In this state of things, can any one doubt but that on accepting this office he was to perform its duties? But it is contended that his duties as clerk ceased the moment the balance of the account was struck. . . We do not think so. His obligations were unchanged; he was the clerk when he got the money, and he was the clerk when he absconded." Murphy was therefore clerk to the society and not treasurer, and he performed the duties of clerk, and *Reg. v. Murphy* (3) is no authority for holding that a treasurer appointed as in this case is a servant. The two cases are quite distinct. In *Reg. v. Proud* (4) the prisoner was indicted for embezzling the money of a friendly society of which he was a member; but he was the secretary, and the rules provided for the appointment of a treasurer, although no treasurer had ever been appointed. The prisoner was found guilty, and the conviction was upheld, I presume, on the same grounds as in *Reg. v. Murphy*. (3)

I believe that there is no case to shew that the treasurer of a friendly society can be indicted for embezzlement. The essence of the indictment in this case is, that the prisoner was a clerk or servant of the trustees. The trustees have all moneys of the society vested in them by act of parliament, as well as by one of their rules, and the prisoner must account to them; but this does not

1869
THE QUEEN
v.
TYRRE.

(1) 4 Cox, C. C. at p. 106.

(2) 4 Cox, C. C. at p. 107.

(3) 4 Cox, C. C. 101.

(4) Leigh & Cave, 97.

1869
THE QUEEN
v.
TYBEE.

make him their servant. The treasurer is an accountable officer but not a servant. We are all of opinion that the conviction must be quashed.

Conviction quashed.

Attorney for prosecution: *J. Wilding.*

Attorney for prisoner: *T. Beard.*

Jan. 30.

THE QUEEN v. SUMMERS.

*Misdemeanour—Prior Conviction of Felony not alleged in Indictment—
Period of Penal Servitude—27 & 28 Vict. c. 47, s. 2.*

27 & 28 Vict. c. 47, s. 2, enacts, that when any person shall, on indictment, be convicted of any crime punishable with penal servitude, after having been previously convicted of felony, the least sentence of penal servitude that can be awarded shall be a period of seven years.

A. was convicted of the misdemeanour of having done grievous bodily harm to B. The indictment did not charge a previous conviction of felony; but after the jury had found A. guilty, it was proved on oath that A. had been previously convicted of felony, but no record or certificate of such conviction was produced. A. was sentenced to penal servitude for five years, as for a misdemeanour only without any previous conviction of felony:—

Held, that the sentence was correct.

CASE stated by the Deputy Assistant-Judge of the Middlesex sessions:—

William Summers was convicted at the Middlesex sessions on the 7th of January last, of the misdemeanour of having inflicted grievous bodily harm on a policeman.

The indictment did not contain any allegation of any previous conviction of felony, and it is not the practice to insert a previous conviction of felony in an indictment for a misdemeanour without some authority by statute, as in such case it would be error on the record. The Larceny Act recognizes the insertion in the indictment of the previous conviction, and gives directions as to the arraignment and trial of the prisoner. A similar provision appears in the Coinage Act; but in the act relating to personal injuries no such machinery is provided or referred to. After the jury had found the prisoner guilty some policemen and prison officers were called, and stated upon oath that the prisoner had been previously

convicted of felony; but no record of any such conviction, nor any certificate of any such, was produced on the part of the prosecution. The learned judge, therefore, treated it as a conviction for the misdemeanour only, without any previous conviction of felony, and passed the ordinary sentence for five years penal servitude accordingly. It was suggested that the sentence ought to have been for seven years penal servitude, under 27 & 28 Vict. c. 47, s. 2. (1)

1869
THE QUEEN
v.
SUMMERS.

The questions for the opinion of the Court were, first, whether that sentence, under the circumstances, was or was not correct; and, secondly, whether the statute 27 & 28 Vict. c. 47, s. 2, authorized the Court to pass a sentence of seven years penal servitude, whether a previous conviction of felony is alleged in the indictment or not?

No counsel appeared.

The case was considered by Bovill, C.J., Channell and Pigott, BB., Byles and Lush, JJ.

BOVILL, C.J. [after reading the case]:—The learned judge treated this case as a misdemeanour only, without any previous conviction of felony, and passed a sentence of five years penal servitude. There are two questions in the case. First, whether the sentence was correct; secondly, whether it ought to have been for seven years? The only question with which we have power to deal is, whether the sentence was right or not. Our opinion is, that the view taken at the trial was correct, and that the sentence is, therefore, right. The question is a simple one, and it is not usual in these cases to give reasons for our judgment at length.

Conviction affirmed.

(1) 27 & 28 Vict. c. 47, s. 2, enacts:—
“Where any person shall, on indictment, be convicted of any crime or offence punishable with penal servitude, after having been previously convicted

of felony . . . the least sentence of penal servitude that can be awarded in such cases shall be a period of seven years.”

1869

Jan. 30.

THE QUEEN v. HIBBERT.

Abduction—Taking Girl under Sixteen out of Possession of her Father—
24 & 25 Vict. c. 100, s. 55.

24 & 25 Vict. c. 100, s. 55, enacts that "whosoever shall take an unmarried girl, under the age of sixteen, out of the possession and against the will of her father or mother, or of any other person having the lawful care and charge of her, shall be guilty of a misdemeanour."

A. met a girl in the street going to school, and induced her to go with him to a town some miles distant, where he seduced her. They returned together and he left her where he met her. The girl then went to her home, where she lived with her father and mother, having been absent some hours longer than would have been the case if she had not met A. A. made no inquiry, and did not know who the girl was, or whether she had a father or mother living or not, but he had no reason to and did not believe that she was a girl of the town:—

Held, that A. was not guilty of having unlawfully taken the girl out of the possession of her father under s. 55 of 24 & 25 Vict. c. 100.

CASE stated by Lush, J.:—

The prisoner was tried at the last assizes at Manchester for having "unlawfully taken Elizabeth Ann Oldham, an unmarried girl under the age of sixteen, out of the possession and against the will of her father," under 24 & 25 Vict. c. 100, s. 55.

The girl, who lived with her father and mother at Ashton, left her home in company with another girl to go to a Sunday school. The prisoner met the two girls in the street, and after some little persuasion induced them to go with him to Manchester, on the pretence of shewing them some object of curiosity there. He paid their railway fare there and back. At Manchester he took them to a public-house and there seduced the girl in question. He then accompanied them back to Ashton and parted from them in the street where he had met them. The girl immediately went home, having been absent some hours longer than she ought to and otherwise would have been.

The prisoner made no inquiry and did not know who the girl was or whether she had a father or mother living or not, but he had no reason to and did not believe that she was a girl of the town.

The jury found him guilty, but in deference to *Reg. v. Green* (1)

(1) 3 F. & F. 274.

the question whether the case is within the statute was reserved and the sentence suspended.

No counsel appeared.

1869

THE QUEEN
v.
HIBBERT.

The case was considered by Bovill, C.J., Channell and Pigott, BB., Byles and Lush, JJ.

BOVILL, C.J. [after reading the case]:—Section 55 of 24 & 25 Vict. c. 100, enacts that “whosoever shall unlawfully take or cause to be taken any unmarried girl being under the age of sixteen years, out of the possession and against the will of her father or mother, or of any other person having the lawful care or charge of her, shall be guilty of a misdemeanour.” In the present case there is no statement of any finding of fact that the prisoner knew or had reason to believe that the girl was under the lawful care or charge of her father, mother, or of any other person. Still less is there any statement that the prisoner knew that she was under the care of her father as charged in this indictment. In some cases, as, for instance, if the girl were a girl of the town, there would be a probability that the person taking her away had no reason to believe that he was taking her out of the possession of her father or other person. In other cases, again, the surrounding circumstances might be such as to satisfy a jury that he had knowledge that he was taking the girl from the possession of those who lawfully had charge of her. In the absence, however, of any finding of fact on this point the conviction cannot be supported. The decision at which we have arrived is quite in accordance with *Reg. v. Green* (1), where the facts resembled those of the present case. Martin, B., there said, “There must be a taking out of the possession of the father; here the prisoners picked up the girl in the streets, and for anything that appeared, they might not have known that the girl had a father. The essence of the offence was the taking the girl out of the possession of the father. The girl was not taken out of the possession of any one. . . . The act of the prisoners was scandalous, but it was not any legal offence.” Under these circumstances, therefore, the conviction must be quashed.

PIGOTT, B. I have felt some doubt on this point, but I do not

(1) 3 F. & F. 274.

1869 dissent from the conclusion that has been arrived at by the rest of
THE QUEEN the Court.

v.
HIBBERT.

LUSH, J. My impression at the trial was that the conviction
was right; but I now think that it cannot be supported.

Conviction quashed.

END OF HILARY TERM

CASES

DETERMINED BY THE

COURT FOR CROWN CASES RESERVED

IN

EASTER TERM, XXXII VICTORIA.

THE QUEEN *v.* JENKINS.

1869

April 24.

Evidence—Admissibility of Dying Declaration—“No present hope of recovery.”

On a trial for murder a written declaration of the deceased was put in evidence for the prosecution. The declaration was made on oath to a magistrates' clerk, about thirteen hours before death. The clerk asked the deceased before he took down her statement, whether she felt she was likely to die? She said, “I think so, from the shortness of my breath.” Her breath was then extremely short. The clerk said, “Is it with the fear of death before you that you make these statements, and have you any present hope of your recovery?”—She said, “None.” The clerk then wrote out her statement, and added to it the above conversation, in the form of a statement by the deceased, but he omitted the word “present” before “hope.” He then read over to the deceased what he had written, and she then added the words “at present” before “hope,” and signed the declaration:—

Held, that the statement was not admissible in evidence, as it did not appear to have been made under a settled hopeless expectation of death, inasmuch as the deceased had expressly qualified the words “no hope,” by inserting before them the words “at present.”

CASE stated by Byles, J.:—

The prisoner was convicted at the last Bristol assizes of the murder of Fanny Reeves, and is now under sentence of death, subject to the decision of the Court of Criminal Appeal as to the admissibility of the dying declaration of the deceased woman.

On the night of the 16th of October, between 8 and 9 o'clock, the deceased was found in the river Avon, at a place where the river is very deep. She was rescued from the water, but in an

1869
THE QUEEN
v.
JENKINS.

exhausted condition, and she became, according to the medical evidence, in great danger. On the next day, the 17th, she said she did not think she should get over it, and desired that some one should be sent for to pray with her. A neighbour accordingly visited her about 8 o'clock P.M., who prayed with her, and, as her mother said, talked seriously to her.

At 10 o'clock the same evening the magistrates' clerk came. He found her in bed, breathing with considerable difficulty and moaning occasionally. He administered an oath, and she made a written statement as hereinafter set forth. He asked her if she felt she was in a dangerous state, whether she felt she was likely to die? She said, "I think so." He said, "Why?"—She replied, "From the shortness of my breath." Her breath was extremely short; the answers were disjointed from its shortness. Some intervals elapsed between her answers. The magistrates' clerk said, "Is it with the fear of death before you that you make these statements?" and added, "Have you any present hope of your recovery?"—She said, "None."

The counsel for the defendant pointed out that in the statement the words "at present" were interlined. The magistrates' clerk was recalled. He said, that after he had taken the deposition he read it over to her, and asked her to correct any mistake that he might have made. She then suggested the words "at present." She said "no hope at present of my recovery." He then interlined the words "at present." She died about 11 o'clock the next morning.

Without the declaration of the deceased, there was not evidence sufficient to leave to the jury; but the other evidence of the prosecution was, so far as it went, confirmatory of the deceased woman's statement. The case, therefore, rested on what was called the dying declaration of the deceased.

The counsel for the prisoner submitted that there was not such an impression of impending death on the mind of the deceased as to render the declaration admissible.

I expressed no opinion, but reserved this question for the opinion of this Court, and I allowed the case to go to the jury.

The case then set out the examination of Fanny Reeves, the deceased. It gave a detailed account of a walk she had taken with

the prisoner on the evening of the 16th of October, and stated that he had induced her to go to the edge of the river Avon, and had then pushed her in. After describing how she was saved from being drowned, the declaration continued:—"After being so taken out I became insensible, and did not recover till I found myself in bed in this house. Since then I have felt great pain in my chest, bosom, and back. From the shortness of my breath I feel that I am likely to die, and I have made the above statement with the fear of death before me, and with no hope *at present* of my recovery. Dr. Smart has been to see me twice to-day." . . .

"The mark X of Fanny Reeves."

The jury found the prisoner guilty.

Sentence of death was passed, but execution stayed, that the opinion of this Court might be taken on the admissibility of the declaration.

The case was argued before Kelly, C.B., Byles, Lush, and Brett, JJ., and Cleasby, B.

Collins (*Norris* with him), for the prisoner. The declaration of the deceased was not admissible in evidence, as it does not appear that she had absolutely no hope of recovery. The general principle on which declarations of this kind are admitted "is that they are made in extremity when the party is at the point of death, and when every hope of this world is gone": *Woodcock's Case*. (1) Before a dying declaration is admissible in evidence, the prosecution must prove affirmatively—First, that it was made under fear of impending death: *Woodcock's Case*. (1) Secondly, that it was made under the expectation of "an almost immediate dissolution:" *Rex v. Crockett* (2), *Rex v. Van Butchell*. (3) Thirdly, that it was made when there was no hope of recovery: *Reg. v. Dalmas*. (4) In *Reg. v. Peel* (5), Willes, J., says that, before a dying declaration is admissible, "it must be proved that the man was dying, and there must be a settled hopeless expectation of death in the declarant." In *Rex v. Hayward* (6) Tindal, C. J., says "any hope of recovery, however slight, existing in the mind of the deceased

(1) 1 Leach, C. C. 500, 502.

(2) 4 C. & P. 544, 545.

(3) 3 C. & P. 629, 631.

(4) 1 Cox, C. C. 95.

(5) 2 F. & F. 21, 22.

(6) 6 C. & P. 157, 160.

1869

THE QUEEN
"JENKINS.

at the time of the declarations made, would undoubtedly render the evidence of such declarations inadmissible." The evidence must also show clearly that the declarant knew the state he was in: *Rea v. Nicholas* (1), *Reg. v. Megson* (2), *Rea v. Spilsbury*. (3) The law regards the admission of these declarations with great jealousy, as they are wanting in those sanctions which guard evidence in other cases: Greenleaf on Evidence, vol. i. s. 162, p. 233, 9th ed.

The declaration in this case did not satisfy the requirements of the law as established by these cases. The clerk wrote down that the declaration was made "with no hope of recovery." These words are in their terms absolute, but the deceased deliberately refused to express herself thus. She said, "No, that is not my meaning. What I wish to say is not that I have no hope, but that I have no hope *at present*." The deceased thus carefully qualified what would otherwise have been an absolute statement, and in the clearest way shewed that she was not entirely without hope. This declaration, therefore, does not come within the rule which admits dying declarations, and there is consequently no evidence against the prisoner, and the conviction should be quashed.

T. W. Saunders (*Bailey* with him), for the prosecution. It is admitted that to make the declaration in this case evidence it must be shewn that it was made in the fear of impending death, under the immediate expectation of death, and when there was no hope of recovery. The authority of the cases that establish these rules cannot be disputed. The prosecution, however, proved all that was necessary to make the declaration evidence. The declaration was made "with the fear of death before me, and with no hope at present of my recovery." If the words "at present" were omitted the case would be clear, but these words do not really alter the meaning of the sentence. The sentiment of hope, or of want of hope, must refer necessarily to the time when the feeling is expressed. "I have no hope," and "I have no hope at present," have the same meaning. Even if some meaning is to be attributed to "at present," its most obvious signification is, that it is not absolutely impossible that the deceased should recover.

(1) 6 Cox, C. C. 120.

(2) 9 Car. & P. 418.

(3) 7 C. & P. 187, 190.

While there is life there is hope, and therefore there cannot be absolutely no hope of recovery.

1869

THE QUEEN
v.
JENKINS.

The real meaning, however, of the insertion of the words "at present" appears in the case. The clerk asked the deceased, "Have you any present hope of your recovery?" She said, "None." He then wrote down "with no hope of my recovery," and she corrected this, because it was not what she had in fact said, and not because it was not what she wished to say. She, no doubt, saw no difference in meaning between the two sentences. Direct evidence need not be given to shew that the deceased was conscious of approaching dissolution. This may be inferred from all the surrounding circumstances: *Reg. v. Brooks*. (1)

KELLY, C.B. We are all of opinion that the conviction must be quashed. The question, and the only question, is, whether the declaration of the dying woman was admissible in evidence, because it is clear that if the declaration is to be excluded, there was no evidence to go to the jury. This question depends upon what passed between the clerk and the deceased just before and at the time when the statement was made. She was asked if she felt she was in a dangerous state, whether she felt she was likely to die? She said "I think so." She did not express an absolute belief, but an impression, that she was likely to die. There is nothing conclusive in this part of the statement. The clerk then went on to ask her why she thought that she was about to die. She replied, "From the shortness of my breath." The clerk says, "Her breath was extremely short—the answers were disjointed from its shortness. Some intervals elapsed between her answers." The clerk then said to her, "Is it with the fear of death before you that you make these statements?" and added, "Have you any present hope of your recovery?" She said, "None." Thereupon he wrote out what he conceived to be the substance of her statement. After detailing the facts of the case, the statement as he wrote it made her say, "I have felt great pain in my chest, bosom, and back. From the shortness of my breath. I feel that I am likely to die, and I have made the above statement with the fear of death before me, and with no hope of my recovery." If the deceased had sub-

(1) 1 Cox, C. C. 6.

1869

THE QUEEN
v.
JENKINS.

scribed this declaration, a very difficult question might have arisen. But it appears that after reading over these words to her, and asking her to correct any mistake he might have made, she suggested the words "at present." She said no hope "at present" of my recovery. The clerk then interlined the words "at present."

The question is, whether this declaration as it now stands was admissible in evidence. The result of the decisions is, that there must be an unqualified belief in the nearness of death, a belief without hope that the declarant is about to die. If we look at reported cases, and at the language of learned judges, we find that one has used the expression "every hope of this world gone" (1); another "settled hopeless expectation of death" (2); another "any hope of recovery, however slight, renders the evidence of such declarations inadmissible." (3) We, as judges, must be perfectly satisfied beyond any reasonable doubt that there was no hope of avoiding death; and it is not unimportant to observe that the burthen of proving the facts that render the declaration admissible is upon the prosecution.

If the present case had rested upon the expression, "I have made the above statement with the fear of death before me, and with no hope of my recovery," a difficult question might have been raised. But when these words were read over to the declarant, she desired to put in the important words "at present;" and the statement so amended is "with no hope at present of my recovery." We are now called upon to say what is the effect of these words, taking into consideration all the circumstances under which they were put in. The counsel for the prosecution has argued that the words "at present" do not alter the sense of the statement. We think, however, that they must have been intended to convey some meaning, and we must endeavour to give effect to that meaning.

It is possible that when the statement was first read over to the deceased, she may have remembered that what she had been asked was, whether she had "any present hope of recovery," and observing that the word "present" was omitted, that she merely wished to correct the discrepancy between the words as spoken and those

(1) Per Eyre, C.B., *Woodcock's Case*, 1 Leach, C. C. at p. 502. (2) Per Willes, J., *Reg. v. Peel*, 2 F. & F. at p. 22.

(3) Per Tindal, C.J., *Reg. v. Hayward*, 6 C. & P. at p. 160.

written down, without wishing to make any alteration in the meaning of those words. On the other hand, she may have meant to alter and qualify the statement as first written. She may have wished to express, "All I meant to say was, 'I have not hope at present;'" but not to say that she had absolutely no hope. The case is capable of either of these two constructions, one of which is against and the other in favour of the prisoner; and if we had simply to choose between the two, without anything to guide us as to the real meaning of the deceased, we should resolve the doubt in favour of the prisoner in *favorem vitæ*.

But another mode of solution is presented which calls on us to decide for the prisoner on another ground. The deceased was asked in express terms by the clerk "to correct any mistake that he might have made." She then said, "Put in the words 'at present.'" Even if this were not a criminal case, this would be sufficient to shew that the omission of "at present" was a mistake—that she meant "no present hope" as distinguished from "no hope." She therefore intended the words to have some substantial meaning; and if they have any meaning at all, they must qualify the absolute meaning which the declaration must contain in order to render it admissible evidence. The conviction must therefore be quashed.

BYLES, J. As I tried the case, I wish to state that I entertain no doubt that the declaration was not admissible. There being no other evidence against the prisoner, I thought it best to admit the declaration, and reserve the point whether it was admissible evidence.

Dying declarations ought to be admitted with scrupulous, and I had almost said with superstitious, care. They have not necessarily the sanction of an oath; they are made in the absence of the prisoner; the person making them is not subjected to cross-examination, and is in no peril of prosecution for perjury. There is also great danger of omissions, and of unintentional misrepresentations, both by the declarant and the witness, as this case shews. In order to make a dying declaration admissible, there must be an expectation of impending and almost immediate death, from the causes then operating. The authorities shew that there must be *no hope whatever*.

1869

THE QUEEN
v.
JENKINS.

1869

THE QUEEN
v.
JENKINS.

In this case the deceased said originally she had no hope at present. The clerk put down that she had no hope. She said in effect when the statement was read over to her, "No, that is not what I said, nor what I mean. I mean that *at present* I have no hope;" which is, or may be, as if she had said, "If I do not get better, I shall die." The conviction must be quashed.

Conviction quashed.

Attorney for prosecution: *Walter Pigeon, Bristol.*

Attorney for prisoner: *J. H. Clifton, Bristol.*

April 24.

THE QUEEN v. TAYLOR.

Misdemeanour necessarily including lesser misdemeanour—Indictment for "Unlawfully and Maliciously Wounding" and for "Unlawfully and Maliciously inflicting grievous bodily harm"—Verdict "Guilty of an Assault."

An indictment charged the prisoner in the first count with "unlawfully and maliciously wounding," and in the second count, with "unlawfully and maliciously inflicting grievous bodily harm." The jury found the prisoner guilty of an assault:—

Held, that the prisoner could be properly convicted of an assault on the indictment, as the offences charged were misdemeanours, and each of them necessarily included the lesser misdemeanour of an assault.

CASE stated by the Chairman of the Quarter Sessions for the North Riding of Yorkshire:—

The prisoner was indicted at the Easter general quarter sessions, 1869, of the North Riding of Yorkshire, for a misdemeanour upon an indictment, the first count of which charged that he "unlawfully and maliciously did wound one Thomas Meek." The second count charged that he "did unlawfully and maliciously inflict grievous bodily harm upon the said Thomas Meek." The jury returned a verdict of "guilty of an assault."

The counsel for the prisoner contended that the prisoner could not be convicted of a common assault on that indictment, and that the verdict therefore amounted to an acquittal.

The Court postponed judgment, and reserved the question, Whether this conviction can be sustained? The prisoner was admitted to bail.

The case was argued before Kelly, C.B., Byles, Lush, and Brett, JJ., and Cleasby, B.

1869

THE QUEEN
v.
TAYLOR.

Shepherd, for the prosecution. The question is, whether there should have been a count for the assault, or the word "assault" in one of the counts. The offences charged are only misdemeanours, and each of them necessarily includes the lesser misdemeanour of a common assault. A verdict for a common assault can, therefore, properly be given on this indictment. The rules relating to felonies do not apply in this case, which concerns misdemeanours only. In *Reg. v. Oliver* (1), a conviction of a common assault was upheld upon an indictment that the prisoner did "make an assault upon, and did unlawfully beat, wound, and ill-treat, and did thereby occasion actual bodily harm" to the prosecutor. The same point was decided in *Reg. v. Yeadon*. (2) These cases do not go quite so far as the present one, because the word "assault" was used in the indictments, but the principle applies to this case as it is not necessary to use the word "assault." Every battery includes an assault, 1 Hawk. P.C. (8th ed.) p. 110, and therefore wounding or inflicting grievous bodily harm necessarily includes an assault: *Reg. v. Ingram*. (3)

No counsel appeared for the prisoner.

KELLY, C.B. This conviction must be affirmed. There is no count in the indictment for an assault, nor is the word "assault" used in the indictment. Each of the two counts is, however, for an offence which necessarily includes an assault, and the offences charged as well as the offence of which the prisoner has been found guilty are misdemeanours. If there were an absence of authority, we think on principle that the jury could properly find a verdict of guilty of a common assault on this indictment. It is not necessary that matters of aggravation stated in the indictment should be proved, and if not proved the prisoner may be found guilty of the offence without the circumstances of aggravation.

There is, however, no want of authority. In *Reg. v. Yeadon* (2), there was an indictment containing a count for an assault occasion-

(1) Bell C. C. 287; 30 L. J. (M.C.) 12. (2) Leigh & Cave, 81; 31 L. J. (M.C.) 70.

(3) 1 Salk. 384.

1869
THE QUEEN
v.
TAYLOR.

ing actual bodily harm, under 14 & 15 Vict. c. 100, s. 29. The jury found a verdict of guilty of a common assault. The chairman of the quarter sessions declined to receive it, and it was held that this amounted substantially to a misdirection, as the verdict was legal, and he was bound to receive it.

In that case the word "assault" was used in the indictment, but coupled with circumstances of aggravation. Nothing, however, turned on the use of the word "assault." The effect of the verdict was held to be to find the prisoner guilty of the offence charged, but without the additional circumstances of aggravation stated in the indictment. That principle applies to this case. On an indictment for a misdemeanour the jury may find the prisoner guilty of any lesser misdemeanour that is necessarily included in the offence as charged.

Conviction affirmed.

Attorneys for prosecution: *Van Sandau & Sons, for Belk, Middlesborough.*

May 1.

THE QUEEN v. LUMLEY.

Presumption—Continuance of Life—Bigamy—Absence for less than Seven Years.

On a trial for bigamy, it was proved that the prisoner married A. in 1836, left him in 1843, and married again in 1847. Nothing was heard of A. after the prisoner left him, nor was any evidence given of his age :—

Held, that there was no presumption of law either in favour of or against the continuance of A.'s life up to 1847; but that it was a question for the jury, as a matter of fact, whether or not A. was alive at the date of the second marriage.

CASE stated by Lush, J. :—

The prisoner was tried before me at the last sittings of the Central Criminal Court, and convicted of bigamy.

The prisoner married one Victor, at St. Helier's, in the island of Jersey, in the year 1836, and lived with him in England until the middle of the year 1843, when they separated, and she was taken by her parents back to Jersey, where she resumed her maiden name. On the 9th of July, 1847, she, describing herself as a spinster, married Captain Lumley, with whom she lived till March, 1864. Nothing was heard of Victor from the time the prisoner left

him in 1843. No evidence was given of the age of Victor, nor any of the age of the prisoner, except that a witness, who stated she was forty-eight years old, said that the prisoner was her senior. I directed the jury that, there being no circumstances leading to any reasonable inference that he had died, Victor must be presumed to have been living at the date of the second marriage. Whether that direction was right or not, is the question I reserved for the opinion of the Court. (1)

I admitted the prisoner to bail.

The case was argued before Kelly, C.B., Byles, Lush, and Brett, JJ., and Cleasby, B.

April 24. *D. Keane, Q.C.* (*Collins* with him), for the prisoner. The direction is wrong, because it withdraws from the jury the question whether or not Victor was alive at the date of the second marriage. This should have been left to the jury as an ordinary matter of fact: *Rea v. Harborne* (2); *Lapsley v. Grierson*. (3) It is admitted that there is no presumption of the death of a person until seven years after he has last been heard of, and that after that time he is presumed to be dead. There is, however, no presumption as to the date of his death: *Nepean v. Doe d. Knight* (4); and therefore no presumption of continuance of life during the seven years. On this point there is no presumption of law at all. Even if there is a presumption of continuance of life, it is rebutted in a case like this by the conflicting presumption of innocence: *Best on Evidence*, 4th ed. p. 446-9; *Rea v. Twynning* (5); *Lapsley v. Grierson*. (3) It then becomes necessary for the prosecution to prove affirmatively that the crime of bigamy has been committed: *Reg. v. Heaton* (6); *Reg. v. Curgerwen*. (7) [He was stopped by the Court.]

Giffard, Q.C. (with him *Besley* and *Gough*). The direction is right, even according to the contention of the prosecution, because

(1) Two other questions were also reserved as to the admissibility of certain evidence in proof of the first marriage. The decision of the Court was, however, given on the question above stated alone, and the other questions were not argued.

(2) 2 A. & E. 540.
 (3) 1 H. L. C. 498.
 (4) 2 M. & W. 894, 914; 2 Sm. L. C., 6th ed. 510.
 (5) 2 B. & Ald. 386.
 (6) 3 F. & F. 819.
 (7) Ante, p. 1.

1869
 THE QUEEN
 v.
 LUMLEY.

1869
THE QUEEN
v.
LUMLEY.

the question whether or not Victor was alive at the date of the second marriage was left to the jury. The learned judge only told them what the presumption of law was.

[LUSH, J. It must be taken that I entirely withdrew the question from the jury. In effect I directed them to return a verdict of Guilty.]

As the law does not presume death until the expiration of seven years after a person is last heard of, it is clear that the law presumes a continuance of life during the seven years; and on this ground the direction was right.

Cur. adv. vult.

May 1. LUSH, J. We are of opinion that the direction to the jury in this case, viz. "that, there being no circumstances leading to any reasonable inference that he had died, Victor must be presumed to have been living at the date of the second marriage," was erroneous. In an indictment for bigamy, it is incumbent on the prosecution to prove to the satisfaction of the jury that the husband or wife, as the case may be, was alive at the date of the second marriage. That is purely a question of fact. The existence of the party at an antecedent period may or may not afford a reasonable inference that he was living at the subsequent date. If, for example, it were proved that he was in good health on the day preceding the second marriage, the inference would be strong, almost irresistible, that he was living on the latter day, and the jury would in all probability find that he was so. If, on the other hand, it were proved that he was then in a dying condition, and nothing further was proved, they would probably decline to draw that inference. Thus the question is entirely for the jury. The law makes no presumption either way. The cases cited of *Reg. v. Twynning* (1), *Reg. v. Harborne* (2), and *Nepean v. Doe d. Knight* (3), appear to us to establish this proposition.

Where the only evidence is that the party was living at a period which is more than seven years prior to the second marriage, there is no question for the jury. The proviso in the Act (24 & 25 Vict. c. 100, s. 57) then comes into operation, and exonerates the prisoner

(1) 2 B. & Ald. 386.

(2) 2 A. & E. 540.

(3) 2 M. & W. 894; 2 Sm. L. C.,
6th ed. 510.

from criminal liability, though the first husband or wife be proved to have been living at the time when the second marriage was contracted. The legislature, by this proviso, sanctions a presumption that a person who has not been heard of for seven years is dead; but the proviso affords no ground for the converse proposition, viz. that when a party has been seen or heard of within seven years, a presumption arises that he is still living. That, as we have said, is always a question of fact.

Being of opinion, upon this ground, that the conviction must be quashed, it becomes unnecessary to consider the other points reserved. (1)

Conviction quashed.

Attorney for prosecution: *H. M. Daniel.*

Attorney for prisoner: *D. Keane.*

(1) See ante p. 197, note (1).

END OF EASTER TERM.

1869
THE QUEEN
v.
LUMLEY.

CASES

DETERMINED BY THE

COURT FOR CROWN CASES RESERVED

IN

MICHAELMAS TERM, XXXIII VICTORIA.

1869

Nov. 13.

THE QUEEN *v.* WILLIAM RITSON AND SAMUEL RITSON.*Forgery—Antedated Deed—“ Forge ”—24 & 25 Vict. c. 98, s. 20.*

It is forgery to make a deed fraudulently with a false date, when the date is a material part of the deed, although the deed is in fact made and executed by and between the persons by and between whom it purports to be made and executed.

CASE stated by Hayes, J. :—

The prisoners were indicted at the last Manchester assizes under 24 & 25 Vict. c. 98, s. 20, for forging a deed with intent to defraud J. Gardner.

W. Ritson was the father of S. Ritson. He had been entitled to certain land which had been conveyed to him in fee, and he had borrowed of the prosecutor J. Gardner, on the security of this land, more than 730*l.*, for which he had given on the 10th of January, 1868, an equitable mortgage by written agreement and deposit of title deeds.

On the 5th of May, 1868, W. Ritson executed a deed of assignment under the Bankruptcy Act, 1861, conveying all his real and personal estate to a trustee for the benefit of creditors; and on the 7th of May, 1868, by deed between the trustee and W. Ritson and the prosecutor, reciting, amongst other things, the deed of assignment and the mortgage, and that the money due on the mortgage was in excess of the value of the land, the trustee and

W. Ritson conveyed the land and all the estate, claim, &c., of the trustee and W. Ritson therein, to the prosecutor, his heirs and assigns, for ever. After the execution of this conveyance the prosecutor entered into possession of the land. Subsequently S. Ritson claimed title to the land, and commenced an action of trespass against the prosecutor. The prosecutor then saw the attorney for S. Ritson, who produced the deed charged as a forged deed, and the prosecutor commenced this prosecution against W. and S. Ritson.

1869

THE QUEEN
v.
RITSON.

This deed was dated the 12th of March, 1868, the date being before W. Ritson's deed of assignment and the conveyance to the prosecutor, and purported to be made between W. Ritson of the one part and S. Ritson of the other part. It recited the original conveyance in fee to W. Ritson, and that W. Ritson had agreed with S. Ritson for a lease to him of part of the land at a yearly rent, and then professed to demise to S. Ritson a large part of the frontage and most valuable part of the land conveyed to the prosecutor as mentioned above, for the term of 999 years from the 25th of March then instant. The deed contained no notice of any title, legal or equitable, of the prosecutor, and contained the usual covenants between a lessor and lessee. It was executed by both W. and S. Ritson.

The case then stated evidence which shewed that the deed had in fact been executed after the assignment to W. Ritson's creditors and after the conveyance to the prosecutor, and that the deed had been fraudulently antedated by W. and S. Ritson for the purpose of overreaching the conveyance to the prosecutor.

The counsel for the prisoners contended that the deed could not be a forgery, as it was really executed by the parties between whom it purported to be made. The learned judge told the jury that if the alleged lease was executed after the conveyance to the prosecutor, and antedated with the purpose of defrauding him, it would be a forgery. The jury found both the prisoners guilty.

The question was, whether the prisoners were properly convicted of forgery under the circumstances.

The case was argued before Kelly, C.B., Martin, B., Blackburn, Lush, and Brett, JJ.

1869

THE QUEEN
v.
RITSON.

Torr, for the prisoners. The deed in this case was not forged, because it was really made between and executed by W. and S. Ritson, the persons by whom it purported to be executed, and between whom it purported to have been made. The date of the deed was false, but a false statement in a deed will not render the deed a forgery. If this deed were held to be a forgery, then any instrument containing a false statement made fraudulently would be forged.

[BLACKBURN, J. This is not merely a deed containing a false statement, but it is a false deed.]

There is no modern case to shew that a deed like this is a forgery. To constitute a forgery, there must be either, first, a false name, or, secondly, an alteration of another's deed, or, thirdly, an alteration of one's own deed. There is no modern authority to include any other kind of forgery. *Salway v. Wale* (1) appears an authority against the prisoners, but that was a decision upon 5 Eliz. c. 14, which is not worded in the same way as 24 & 25 Vict. c. 98, s. 20. The definitions of the text writers, which may seem to include a case like the present, are not in themselves authorities. The decisions on which the definitions purport to be based, and not the definitions themselves, are the authorities which must be looked at.

Addison, for the prosecution. The deed in this case is a forgery because it is a false deed fraudulently made. Although there is no recent case where similar facts have been held to constitute a forgery, yet such a state of facts comes within the definitions of forgery given by the text books: Russell, vol. ii. p. 709, 4th ed.; Hawkins, P. C. bk. i. cap. 20, p. 263, 8th ed.; 3 Inst. 169; Bacon's Abr., tit. Forgery, A.; Comyns Dig., tit. Forgery, A. I. *Salway v. Wale* (1) is also an authority for the conviction. The essence of forgery is the false making of an instrument: *Rex v. Parkes*. (2)

KELLY, C.B. During the argument I certainly entertained doubts on this question, because most, or indeed all, the authorities cited are comparatively ancient. They are all before the statute (24 & 25 Vict. c. 98, s. 20), on which this indictment is framed, and before 11 Geo. 4 & 1 Wm. 4, c. 66, the statute which was in force when most of the modern text-books on criminal law

(1) Moore, 655.

(2) 2 Leach, at p. 785.

were written. When, however, we look to all these authorities and to the text-writers of the highest reputation, such as Comyns (Dig., tit. Forgery, A. I.), Bacon (Abr., tit. Forgery, A.), and Coke (3 Inst. 169), we find there is no conflict of authority. Sir M. Foster (Foster's Crown Cases, 116), Russell on Crimes (vol. ii. p. 709, 4th ed.), and other writers, also all agree. The definition of forgery is not, as has been suggested in argument, that every instrument containing false statements fraudulently made is a forgery; but, adopting the correction of my Brother Blackburn, that every instrument which fraudulently purports to be that which it is not is a forgery, whether the falseness of the instrument consists in the fact that it is made in a false name, or that the pretended date, when that is a material portion of the deed, is not the date at which the deed was in fact executed. I adopt this definition. It is impossible to distinguish this case in principle from those in which deeds made in a false name are held to be forgeries.

There is no definition of forgery in 24 & 25 Vict. c. 98, but the offence has been defined by very learned authors, and we think this case falls within their definitions. Under these circumstances the conviction must be affirmed.

MARTIN, B. I am of the same opinion. Mr. Torr was no doubt right in saying that this is not a familiar case. That, however, need not affect the principle to be applied in deciding it. All the authorities are to the same effect. What is laid down on the subject by Comyns (Dig., tit. Forgery, A. I.), Russell on Crimes (vol. ii. p. 709, 4th ed.), Sir M. Foster (Foster's Crown Cases, 116), and in Tomlin's Law Dictionary (Forgery), is good sense. All the authorities, both the ancient and modern, agree. There is no reason why the principle of these authorities should not apply to the present case, except that the facts here are somewhat unusual.

BLACKBURN, J. I am of the same opinion. By 24 & 25 Vict. c. 98, s. 20, it is felony to "forge" any deed with intent to defraud. The material word in this section is "forge." There is no definition of "forge" in the statute, and we must therefore inquire what is the meaning of the word. The definition in Comyns (Dig., tit. Forgery, A. I.) is "forgery is where a man fraudulently writes or publishes a false deed or writing to the prejudice of the right of

1869

THE QUEEN
v.
RITSON.

1869

THE QUEEN
v.
RITSON.

another"—not making an instrument containing that which is false, which, I agree with Mr. Torr, would not be forgery, but making an instrument which purports to be that which it is not. Bacon's Abr., (tit. Forgery, A.), which, it is well known, was compiled from the MS. of Chief Baron Gilbert, explains forgery thus: "The notion of forgery doth not so much consist in the counterfeiting of a man's hand and seal . . . but in the endeavouring to give an appearance of truth to a mere deceit and falsity, and either to impose that upon the world as the solemn act of another which he is in no way privy to, or at least to make a man's own act appear to have been done at a time when it was not done, and by force of such a falsity to give it an operation which in truth and justice it ought not to have." The material words, as applicable to the facts of the present case, are, "to make a man's own act appear to have been done at a time when it was not done." When an instrument professes to be executed at a date different from that at which it really was executed, and the false date is material to the operation of the deed, if the false date is inserted knowingly and with a fraudulent intent, it is a forgery at common law.

Ordinarily the date of a deed is not material, but it is here shewn by extrinsic evidence that the date of the deed was material. Unless the deed had been executed before the 5th of May, it could not have conveyed any estate in the land in question. The date was of the essence of the deed, and as a false date was inserted with a fraudulent intent, the deed was a false deed, within the definition in Bacon's Abridgement. This is a sufficient authority.

If, however, there were no authority, I think that the principle I have mentioned is right and expedient. Besides this, however, Coke (3 Inst. 169), speaking of forgery before the statute of Elizabeth (5 Eliz. c. 14), states that the principle of forgery does apply to a case like this, and that to make a deed purporting to bear a false date may be forgery. To the same effect is Sir M. Foster in *Lewis's Case* (1), where all the judges in consultation assumed that antedating a deed might be forgery.

All the text-books agree, and there is no single authority against the definition I have stated. Mr. Torr, however, says that the definition is old. I think that this gives it all the greater weight.

(1) Foster's Crown Cases, 116.

LUSH, J. I also think that the conviction should be affirmed. If the parties to this deed had inserted the true date in the first instance and had subsequently altered it, there is no question that it would have been a forgery. The offence would then have fallen within the letter of 24 & 25 Vict. c. 98, s. 20, which says, "Whoever with intent to defraud shall forge or alter . . . any deed," &c., shall be guilty of felony. It would be absurd to hold that an alteration might constitute a forgery, but that an original false making would not. We could not yield to such a distinction unless we were obliged. I am satisfied that "forge" in s. 20 of 24 & 25 Vict. c. 98, should be understood in the sense in which that word is used in the authorities, new and old, on the subject. To make a deed appear to be that which it is not, if done with a fraudulent intent to deceive, is a forgery, whether the falsehood consist in the name or in any other matter.

1869

THE QUEEN
v.
RITSON.

BRETT, J., concurred.

Conviction affirmed.

Attorney for prisoner: *J. Pearce, for S. Stringer, Manchester.*

THE QUEEN v. PETER McGRATH.

Nov. 13.

Larceny—Mock Auction—"Taking"—Payment made under Fear.

A. acted as auctioneer at a mock auction. He knocked down some cloth for 26s. to B., who had not bid for it, as A. knew. B. refused to take the cloth or to pay for it; A. refused to allow her to leave the room unless she paid. Ultimately, she paid the 26s. to A., and took the cloth. She paid the 26s. because she was afraid. A. was indicted for, and convicted of, feloniously stealing these 26s.:—

Held, that the conviction was right, because if the force used to B. made the taking a robbery, larceny was included in that crime; if the force was not sufficient to constitute a robbery, the taking of the money nevertheless amounted to larceny, as B. paid the money to A. against her will, and because she was afraid.

Held, further, that, under the circumstances, it was not necessary that the jury should be asked whether B. paid the money against her will, as from the evidence stated in the case it was clear that there could have been no doubt in the minds of the jury that the money was so paid.

CASE stated by the Assistant Barrister to the Recorder of Liverpool.

At the court of quarter sessions for the borough of Liverpool,

1869

THE QUEEN
v.
McGRATH.

on the 30th of August, 1869, P. McGrath was tried upon an indictment which charged him with feloniously stealing 26s., the money of Peter Powell.

It was proved that on the 26th of August, 1869, Jane Powell, the wife of the prosecutor, Peter Powell, passed a sale room, and upon being invited to enter, did so. There were about one dozen persons in the sale room, and the prisoner was acting as auctioneer, and selling table cloths and other articles. After two table cloths had been sold and purchased by two women who were present, a piece of cloth was put up for sale by auction, the prisoner acting as auctioneer. A man bid 25s. for it, when another man standing between Jane Powell and the door said to the prisoner that she had bid 26s. for it, upon which the prisoner knocked it down to her. The witness Jane Powell said: "I had not bid for it, nor made any sign. I told the prisoner I had not bid. He said I did. I said I did not, and would not pay for it: I said this several times. I went to go out. The prisoner said I had bid for it, and must pay before I would be allowed to go out. I was then prevented going out by the man who had said I had bid for it. He stood between me and the door, and said I must pay for it. I wanted to go out and the man prevented me. I then paid 26s. to the prisoner: I paid the money because I was afraid. The piece of cloth was then given to me, and I took it away." In about an hour after she returned and saw the prisoner, and told him she could not keep the cloth, as she had not bid for it. He told her he could not give the money back, but if she came the following week he would exchange it. The next day the place was closed when Peter Powell and his wife went to call there about the cloth, but close by in the street the prisoner and the man who said she had bid, and another man, by whom Jane Powell had been invited on the first occasion into the sale room, were seen together. They immediately separated, and went different ways. Peter Powell followed the prisoner, and said to him: "I believe you are the man who forced my wife to pay for a piece of cloth she never bid for?" upon which he replied, "I told her to come to the house on Monday." The prisoner was given into custody. When charged he said to the policeman, "She cannot lock me up; she paid me the money."

The counsel for the prisoner objected that the facts did not prove a larceny.

1869

THE QUEEN
v.
McGRATH.

The jury were directed that if the prisoner had the intention to deprive Jane Powell of her money, and in order to obtain it was guilty of a trick and artifice, by fraudulently asserting that she had made a bid, when she had not, as he well knew, and that he obtained the money by such means, he was guilty of the offence charged.

The jury found that no bid had been made by Jane Powell, which the prisoner knew, and that he obtained the money from her by the trick and artifice mentioned above. A verdict of guilty was then entered.

The questions were, first, whether the facts proved a larceny; secondly, whether the jury were rightly directed.

The case was argued before Kelly, C.B., Martin, B., Blackburn, Lush, and Brett, JJ.

Commins, for the prisoner. The facts stated in this case cannot amount to larceny, and even if they did, the jury were misdirected, and have not found facts sufficient to sustain the conviction.

First, Jane Powell gave the money to the prisoner. It was not taken from her; there was, therefore, no larceny, as a "taking" is the essence of larceny: *Reg. v. Wilson*. (1) There was no such force as to constitute robbery: *Rex v. Wood*. (2) It cannot be said that the money was given under fear of personal violence. If, however, a robbery was committed, the prisoner ought to have been indicted for that crime and not for larceny, which is a different offence.

Secondly, even supposing that the facts stated in the case might amount to larceny, yet those facts have not been found by the jury. The jury were not asked whether the money was obtained against the will of Jane Powell, yet this is a necessary ingredient in the crime of larceny. The facts of the case shew clearly that the money was not obtained by a trick, because Jane Powell was not deceived. The money, therefore, was given either willingly or through fear. The jury have not found that the money was given

(1) 8 C. & P. 111.

(2) 2 Leach, 721.

1869
THE QUEEN
v.
McGRATH.

through fear, and therefore it cannot be assumed against the prisoner that it was not given willingly.

McConnell, for the prosecution. The prisoner was properly convicted, because the facts found by the jury amount to larceny.

In the first place the prisoner's offence was robbery; there was sufficient force used to constitute robbery. The prisoner is therefore guilty of larceny, which is included in robbery, and he can be properly convicted on an indictment for larceny. Even if there was not force enough to constitute a robbery, still there was enough to make the taking larceny. If a person is induced by fear to give money against his will, this makes the taking of the money larceny, even although there is not sufficient force to make the crime robbery. Obtaining money against a person's will is a sufficient "taking" within the definition of larceny.

Not only was the money obtained against the will of Jane Powell, but it was also obtained, as the jury have found, by a trick; a taking by a trick may be larceny: *Reg. v. Morgan*. (1) The money here was obtained by fraud and force. Obtaining money in either of these ways may amount to larceny; much more so must it be larceny when both fraud and force are employed.

There was no misdirection. The intent with which an act is done must be left to the jury, and this was done here, and the jury have found that the money was obtained by a trick, and that the prisoner knew that no bid had been made. It was not necessary to ask the jury formally whether Jane Powell gave her money willingly. There was and could have been no doubt at the trial on this point. The jury must have thought that the money was given unwillingly. The facts stated in the case shew clearly that the money was not obtained from Jane Powell of her own free will.

KELLY, C.B. I think the conviction ought to be affirmed. The prisoner acted as, and professed to be, an auctioneer. There was a bid for the piece of cloth, and it was knocked down, or at least the prisoner pretended to knock it down, to Jane Powell. An altercation then arose. Jane Powell said the cloth was not knocked down to her, and that she had not bid for it. The

(1) Dears. C. C. 395.

prisoner knew that this was so, but pretended that she had made a bid for the cloth. He went up to her and intimidated her, for she says in her evidence that she was afraid of him. She was told that she should not leave the room, unless she paid for the cloth. In consequence of being thus frightened by the prisoner, and of his threat that she should not leave the room, she paid the money. The meaning of the finding of the jury must be taken to be, that she did not pay the money voluntarily. She was induced to do so by a subterfuge, and also by a threat of what might have amounted to personal violence. Under these circumstances she parted with the money against her will. The question is, whether on these facts the prisoner was properly convicted of larceny.

1869

THE QUEEN
v.
McGRATH.

There are several definitions of larceny. Bracton (Lib. 3, c. 32) defines it thus: "*Furtum est contractatio rei alienæ fraudulenta cum animo furandi invito illo cuius res illa fuerit.*" In modern times Mr. East (1) has defined larceny to be "the wrongful or fraudulent taking and carrying away by any person of the mere personal goods of another with a felonious intent to convert them to his (the taker's) own use, and make them his own property without the consent of the owner." The latter definition has been adopted by Parke, B. (2), and other judges of high authority. The Criminal Law Commissioners thus define larceny: "Theft is the wrongfully obtaining possession of any moveable thing which is the property of some other person, and of some value, with the fraudulent intent entirely to deprive him of such thing, and have or deal with it as the property of some person other than the owner." (Cr. L. Com. 1845—9, 3rd rep.) This case comes exactly within this definition, as the money was taken against the will of the owner. Jane Powell did not part with it voluntarily, but the possession was obtained by fraud and force. Both these causes operated on her mind. The crime of obtaining money by false pretences differs from larceny. It is constituted by the pretence that something has taken place which, in fact, has not taken place. The present is a different case. Jane Powell was not deceived. She was intimidated, and by the operation of both the intimidation and the surprise at the trick she was induced to give up her money against her will.

(1) 2 East, P. C. 553.

(2) *R. v. Holloway*, 1 Den. C. C. at p. 375.

1869

THE QUEEN
v.
McGRATH.

It is not necessary to consider whether there was sufficient force used to constitute a robbery. If there was such force then the prisoner was properly convicted of larceny, which is included in the crime of robbery. All the elements of larceny would then be present.

It has been also argued that the direction to the jury was wrong. It might possibly have been better if the question had been put directly to the jury whether the money was obtained by the threat of personal violence. We could not, however, say that the jury were improperly directed in being asked whether the money was obtained by a trick or artifice. It would, under the circumstances, have been superfluous to have asked the jury whether the prosecutrix parted with her money against her will.

MARTIN, B. The indictment in this case was for larceny. If a robbery was, in fact, committed, that does not prevent a conviction for larceny. There is no reason why the robbery, which is the greater offence, may not be waived, and the larceny, the lesser offence, be charged and proved.

BLACKBURN, J. I am of the same opinion. To constitute a larceny there must be an *animus furandi*, i.e. a felonious intent to take the property of another against his will. The essence of the offence is knowingly to take the goods of another against his will. The goods may be obtained in various ways. If by force, then a robbery is committed. This would include larceny, but force is not a necessary ingredient in larceny. It is sufficient to constitute a larceny if the goods are obtained against the will of the owner. It would be a scandal to the law if goods could be obtained by frightening the owner, and yet that this should not constitute a taking within the meaning of the definitions of larceny. The material ingredient is that the goods should be obtained against the will of the owner. The other ingredients of larceny undoubtedly existed here, as appears from the evidence in the case.

There is ample evidence that the money was obtained against the will of Jane Powell. If there had been any doubt upon the point the jury should have been asked the question; but it is clear that Jane Powell did not part with her money of her own free

will. This is, in effect, stated in the case. There was evidence that the money was obtained by the prisoner with a felonious intent and against the will of Jane Powell. The jury have, in effect, found these facts against the prisoner, and these facts constitute larceny. Even if a robbery had, in fact, been committed, that does not preserve the prisoner from the liability to be convicted of larceny. A robbery includes a larceny. There may be some doubt whether a robbery was committed in this case; but it is not necessary to consider that question.

1869

THE QUEEN
v.
McGRATH.

LUSH, J. I had some doubt during the argument whether there had been any sufficient taking; but I now think that there was a sufficient taking to constitute larceny, as the money was specifically demanded by the prisoner, and was exacted by him from Jane Powell under coercion, and whilst she was prevented from leaving the room.

BRETT, J. The question is, whether there was a sufficient taking of the money. If the matter rested on the trick alone that might be insufficient, as it is rather evidence of the prisoner's motives than the means by which he obtained the money. I had some doubt also whether the fear of a temporary imprisonment, not accompanied by any personal violence, rendered the taking in this case a robbery. Upon consideration, however, I think that as the threat was capable of being executed, and Jane Powell really parted with her money against her will, that is sufficient to constitute a larceny. There was evidence of such a taking, and the jury have found, in effect, that the money was obtained under a fear sufficient to make the giving of it an unwilling act. Consequently the taking was against the will of Jane Powell, and was therefore a larceny.

It is doubtful whether the direction would have been sufficient if there had been any doubt as to whether Jane Powell parted willingly with her money. The evidence shews however that there was no doubt on this point.

Conviction affirmed.

Attorneys for prosecution: *Wright & Venn.*

Attorney for prisoner: *F. J. Wilcocks, Liverpool.*

1869

Nor. 20.

THE QUEEN v. WILLIAM E. HODGKISS.

Perjury—Affidavit under Bills of Sale Act (17 & 18 Vict. c. 36)—False Oath—Misdemeanour at Common Law—Practice.

A. was indicted for perjury in an affidavit made under the Bills of Sale Act for the purpose of getting a bill of sale filed. The indictment was in the ordinary form. The affidavit was sworn before a commissioner for taking affidavits in the Court of Queen's Bench. A. was found guilty :—

Held, that A.'s offence did not constitute perjury, but that nevertheless the conviction should be affirmed, because A. was guilty of taking a false oath, which offence was sufficiently charged in the indictment, and was, under the circumstances, a common law misdemeanour, to the punishment for which he might be sentenced.

CASE stated by Pigott, B. :—

The prisoner was tried at the last summer assizes for the county of Worcester, upon an indictment in the ordinary form for wilful and corrupt perjury in an affidavit sworn by him before a commissioner for taking affidavits in the Court of Queen's Bench. The affidavit was sworn before the commissioner at Stourbridge, and was made for the purpose of getting a bill of sale filed. It was material in the affidavit to state the date when the bill of sale was made, which the prisoner swore was on the 18th of December, 1868, whereas it was, in fact, made on the 4th of January, 1869.

The counsel for the prisoner objected that such an affidavit could not be the subject of an indictment for perjury, not being, as he contended, sworn in a judicial proceeding. The objection was overruled and the case left to the jury, who found the prisoner guilty. The prisoner was admitted to bail.

The question was whether the prisoner was properly convicted.

The Bills of Sale Acts are the 17 & 18 Vict. c. 36, and 29 & 30 Vict. c. 96.

No counsel appeared.

KELLY, C.B. In this case the prisoner was indicted for perjury in making a false affidavit under the Bills of Sale Act. It is clear that the making of such false affidavit is not strictly perjury. The prisoner, therefore, is not liable to any sentence that can only be pronounced against those guilty of perjury. It is also clear,

however, that the taking of a false oath in a case like this, where an affidavit is required for the purposes of a statute, is a misdemeanour at common law, and renders the guilty person liable to punishment for a common law misdemeanour.

1869
THE QUEEN
v.
HODGKINS.

It is true that an indictment for perjury, after stating the facts on which the charge is made, proceeds in conclusion that "the said A. B. did wilfully and corruptly commit wilful and corrupt perjury." This conclusion may, however, be rejected as surplusage. If this is done, the indictment sufficiently states a misdemeanour in taking a false oath, and the prisoner is liable to, and on this conviction may be sentenced to, the punishment that is imposed by common law for this common law misdemeanour. I think, therefore, the conviction should be affirmed.

MARTIN, B. In *Rex v. Foster* (1) the facts were somewhat similar to the present case. The prisoner was convicted on an indictment for perjury. The prisoner, in fact, had only taken a false oath, and the judges held that no punishment could be inflicted. They so held, however, because the indictment did not state facts sufficient to constitute the offence of taking a false oath. Here, that offence is sufficiently stated, and the prisoner is, therefore liable to the punishment for that misdemeanour.

BYLES, BLACKBURN, and LUSH, JJ., concurred.

Conviction affirmed.

(1) Russ. & Ry. 459. See also *Reg. v. Chapman*, 1 Den. C. C. 432; 18 L. J. (M. C.) 152.

1869

THE QUEEN v. WILLIAM MARTIN.

Nov. 13.

Practice—Proof of previous Conviction—Offences relating to the Coin—Misdemeanour—Felony—24 & 25 Vict. c. 99, ss. 12, 37.

By s. 10 of 24 & 25 Vict. c. 99, uttering counterfeit coin knowing it to be counterfeit is a misdemeanour. By s. 11, the possession of counterfeit coin, knowing it to be counterfeit, and with intent to utter the same, is a misdemeanour. By s. 12, whosoever having been convicted of (amongst others) any offence in the three preceding sections mentioned, shall afterwards commit any of the offences mentioned in those sections, shall be guilty of felony, and liable to punishment as therein specified. By s. 37, where any person shall have been convicted of any offence against any Act relating to the coin, and shall afterwards be indicted for any offence against this Act, it shall be sufficient, in any such indictment, after charging such subsequent offence, to state and to prove at the trial the previous conviction in the manner therein specified, and upon any such indictment the prisoner shall in the first instance be arraigned upon and tried for the subsequent offence only; and if he is found guilty the previous conviction may then be inquired into, but not before.

A. was indicted under s. 12 for feloniously having in his possession counterfeit coin, after a previous conviction for uttering counterfeit coin:—

Held,—overruling *Reg. v. Goodwin* (10 Cox, C. C. 534),—that s. 37 applies to a trial on an indictment under s. 12, and that therefore the previous conviction could not be proved until the jury had found A. guilty of the subsequent offence.

CASE stated by W. Forsyth, Q.C., commissioner:—

At the last Leeds summer assizes William Martin was tried on the charge of being feloniously in possession of counterfeit coin, he having been before convicted of uttering counterfeit coin.

At the outset of the case the counsel for the prosecution proposed to give in evidence a certificate to prove the previous conviction of the prisoner. The counsel for the prisoner objected, and the commissioner, having regard to s. 37 of 24 & 25 Vict. c. 99, refused to receive the evidence at that stage of the case. Evidence was then given to shew that the prisoner was guilty of the subsequent offence charged, but the commissioner refused to allow evidence to be given of the previous conviction until the jury should give their verdict upon the subsequent charge. At the close of the case for the prosecution, the counsel for the prisoner contended that there was no case of felony to go to the jury, for that the offence of being in possession of counterfeit coin was, by s. 12 of 24 & 25 Vict. c. 99, made felony only when there had been a

previous conviction of an offence relating to the coin, and no such previous conviction had been proved.

The case was then left to the jury upon the question whether the prisoner was guilty or not of the subsequent offence. The jury found a verdict of guilty. The prisoner was then asked whether he had been previously convicted as charged in the indictment, and he admitted that he had been so convicted. The commissioner deferred passing sentence, and the prisoner remained in custody.

The question was, whether the commissioner was right in rejecting the certificate when it was tendered in evidence, and in submitting to the jury the question whether the prisoner was guilty of the subsequent offence before the previous conviction had been proved against him. (1)

The case was argued before Kelly, O.B., Martin, B., Blackburn, Lush, and Brett, JJ.

(1) 24 & 25 Vict. c. 99, s. 10, enacts that, "whosoever shall utter counterfeit coin, knowing it to be counterfeit, shall be guilty of a misdemeanour."

s. 11 enacts that, "whosoever shall have in his possession counterfeit coin, knowing it to be counterfeit, and with intent to utter the same, shall be guilty of a misdemeanour."

s. 12:—"Whosoever, after having been convicted of (amongst others) any such offence as in any of the last three preceding sections mentioned, shall afterwards commit any of the offences in any of the said sections mentioned, shall be guilty of felony, and liable to the punishment therein provided."

s. 37:—"Where any person shall have been convicted of any offence against this Act, or any former Act relating to the coin, and shall afterwards be indicted for any offence against this Act, committed subsequent to such conviction, it shall be sufficient, in any such indictment, after charging such subsequent offence," to state in such indictment, and to prove at the trial in the manner therein specified, such

previous conviction, "and the proceedings upon any indictment for committing any offence, after a previous conviction or convictions, shall be as follows; that is to say, the offender shall, in the first instance, be arraigned upon so much only of the indictment as charges the subsequent offence; and if he plead not guilty, or if the Court order a plea of not guilty to be entered on his behalf, the jury shall be charged, in the first instance, to inquire concerning such subsequent offence only, and if they find him guilty, or if, on arraignment, he plead guilty, he shall then, and not before, be asked whether he had been previously convicted, as alleged in the indictment, and if he answer that he had been so previously convicted, the Court may proceed to sentence him accordingly; but if he deny that he had been so previously convicted, . . . the jury shall then be charged to inquire concerning such previous conviction, and in such case it shall not be necessary to swear the jury again. . . ."

1869

THE QUEEN
v.
MARTIN

1869

No counsel appeared for the prisoner.

THE QUEEN
v.
MARTIN.

Forbes, for the prosecution. The question is, whether the procedure prescribed by s. 37 of 24 & 25 Vict. c. 99, applies to indictments under s. 12 of the same statute, which makes an offence, in itself a mere misdemeanour, a felony, if committed after a previous conviction. There has been some doubt as to the practice in these cases, but it has been ruled that s. 37 does not apply to indictments under s. 12 by Willes, J., in *Reg. v. Wade*, at the Warwick winter assizes, 1861 (1), and by Lush, J., at the Leeds spring assizes, 1867. (2) This ruling of Lush, J., was approved and followed by Mellor, J., in *Reg. v. Goodwin*. (3) In these cases the previous conviction was proved before the subsequent offence was left to the jury. This, however, seems to be contrary to the express words of s. 37.

KELLY, C.B. The conviction must be affirmed, as the procedure adopted was right. Section 37 applies to and expressly provides for such a case as this.

BLACKBURN, J. I have always acted on the principle that the jury should first be asked as to the subsequent offence, and afterwards as to the prior conviction.

LUSH, J. My attention was not drawn to s. 37 when I ruled as I am reported to have done at Leeds.

MARTIN, B., and BRETT, J., concurred.

Conviction affirmed.

Attorney for prosecution: *The Solicitor to the Treasury.*

(1) Not reported.

(2) Cited Archbold, Cr. Pl. p. 700, 6th ed.

(3) 10 Cox, C. C. 534. This case

was cited in the argument, but no reference was given. *Forbes* stated that he had not been able to find any report of the case.

CASES
DETERMINED BY THE
COURT FOR CROWN CASES RESERVED
IN
HILARY TERM, XXXIII VICTORIA.

THE QUEEN v. GEORGE FRENCH.

1870

Jan 22.

Forgery—"Acquittance or Receipt for Money"—24 & 25 Vict. c. 98, s. 23.

Section 23 of 24 & 25 Vict. c. 98, enacts that "whosoever shall forge . . . any acquittance or receipt for money . . . shall be guilty of felony."

A. was secretary of a friendly society which had branches in various towns. Any member who had paid all his dues, on going from one of these towns to another, was entitled to a document called a "clearance," which admitted him to membership at any place where a branch of the society existed. The qualifications for membership were the payment of an entrance fee, a time of probation, and certain general payments which were made to the secretary, whose duty it was at once to hand them over to the treasurer. A clearance had to be signed by the secretary and by two other officers of the society. Neither of these two officers received or was responsible for any of these payments, nor were their signatures to a clearance understood as importing that any money had been received by them. C., a member of the society, was entitled to a clearance, having paid A. all his dues, but the money he had so paid had not been accounted for by A. to the treasurer. A. sent C. a clearance to which he had forged the names of the two officers whose signatures besides his own were necessary for the validity of the clearance. The clearance certified that the bearer C. was a member of the branch of the society granting it, and had paid all dues and demands, and it then authorized any other branch to receive C. as a clearance member:—

Held, that the clearance was not an "acquittance or receipt for money" within s. 23 of 24 & 25 Vict. c. 98.

THE CASE stated by Lush, J. :—

Indictment under 24 & 25 Vict. c. 98, s. 23, for forging an acquittance or receipt for money.

1870
THE QUEEN
v.
FRENCH.

The prisoner was secretary of a friendly society called the Ancient Order of Foresters, which had branches in various towns. A member removing from one place to another, who had paid all dues, was entitled to a document in the form hereafter set out, called a "clearance," which admitted him to all the privileges of membership at any place where a branch of the society existed. The qualifications for membership were the payment of an entrance fee, a certain time of probation, and certain general payments made at meetings of the society, called "courts." At these courts, constituted by the presence of the chief ranger, the sub-chief ranger, the treasurer, the secretary, and two members at the least, the payments were made to the secretary, and by him handed over there and then to the treasurer. Neither the chief ranger nor the sub-chief ranger received or was responsible for any of these payments, nor were their signatures to a clearance understood as importing that any money had been received by them, or either of them; but a clearance without their signatures would not have been accepted.

Edward Cragg, a member of the society, was entitled to a clearance; but the money he had paid had not been accounted for by the prisoner to the treasurer. The prisoner sent to Cragg a clearance, of which the following is a copy, and to which he forged the names of the chief and the sub-chief rangers:—

"Ancient Order of Foresters' Friendly Society. Members' clearance. Authorized form pursuant to General Law.

"Saml. Shawcross, permt. sec.

"Court Painters No. 4076 of the Leeds district, held at the Harewood Arms, Harewood street, in Leeds, in the county of York.

"To all whom it may concern:

"These are to certify that the bearer hereof, Brother Edward Cragg, a married man, now aged twenty-six years, by trade a painter, was admitted a member of the above court on the 25th day of June, 1864, and has paid all dues and demands up to the 29th day of August, 1868.

"We therefore hereby authorize any court of the order to accept the said brother as a clearance member, subject to the conditions

expressed in the general laws to which, so far as they may apply to the above court, we undertake to conform.

1870

THE QUEEN
v.
FRENCH.

"In witness whereof we have, by order of the court and on its behalf, subscribed our hand and affixed the seal of the court.

L.S.

" Thomas Maw, chief ranger.

" John Doyle, sub-chief ranger.

" George French, secretary.

" Caution.—The member to whom the clearance is granted must throw it into some legal court within two calendar months from the time of drawing the same ; and, should it be refused by any court, it must be returned to the court which granted it within one calendar month, or the member will become suspended. (See General Laws, 92, 93, 94, 95).

" We, the undersigned, declare that this is the document presented to this court, No. 1567, by Brother Cragg, on October 26, 1868.

" May 24, 1868.

L.S.

" William Tranter, C. R.

" Nathaniel Powell, S. C. R.

" Thomas Bates, secretary.

" Ct. 1567."

The prisoner was convicted.

The question for the opinion of the Court was, whether the above document was an acquittance or receipt for money within the meaning of s. 23 of 24 & 25 Vict. c. 98. (1)

No counsel appeared.

COCKBURN, C.J. We entertain no doubt in this case, although we have not had the advantage of hearing counsel. The question is, whether the document which the prisoner has forged is an

(1) Section 23 of 24 & 25 Vict. c. 98, enacts that, "whosoever shall forge . . . any undertaking, warrant, order, authority, or request for the payment of money, or for the delivery or transfer of any goods or chattels, or of any note, bill, or other security for the payment of money or for procuring or giving credit, or any indorsement on, or assign-

ment of any such undertaking, warrant, order, authority, or request, or any accountable receipt, acquittance, or receipt for money or for goods, or for any note, bill, or other security for the payment of money, or any indorsement on or assignment of any such accountable receipt . . . shall be guilty of felony. . . ."

1870

THE QUEEN
v.
FRENCH.

acquittance or receipt within s. 23 of 24 & 25 Vict. c. 98. The prisoner was the secretary of a friendly society which had branches in various towns, and by an arrangement common in such societies a member of one branch could not be received in any other branch without a clearance—that is, a certificate under the hands of certain officers of the society that the member wishing to change had discharged all his dues and obligations to the society. The prisoner had received all the payments that were due from a member who wished to obtain a clearance, and who was entitled to receive a clearance. The prisoner did not pay over to the treasurer, as he should have done, the money he received from this member, and when the member asked him for the clearance to which he was entitled, the prisoner forged the signatures of the officers whose signatures were necessary for the validity of the document.

The document, however, thus forged is not an acquittance or receipt. It purports to be a certificate that the member receiving it has been a member of the branch granting it, and has paid all dues and demands up to a certain date. The document then goes on: “We, therefore, hereby authorize any court of the order to accept the said brother as a clearance member, subject to the conditions,” &c., &c. This, therefore, is simply a certificate, and not an acquittance or receipt for money.

BYLES and KEATING, JJ., PIGOTT and CLEASBY, BB., concurred.

Conviction quashed.

THE QUEEN v. ELIJAH HAPGOOD AND AARON WYATT.

1870

Indictment for Felony—Aiding and Abetting—Conviction for an Attempt—
14 & 15 Vict. c. 100, s. 9.

Jan. 22.

An indictment charged H. with rape, and W. with aiding and abetting in the rape. The jury found H. and W. guilty of misdemeanour; H. of attempting to commit a rape, and W. of aiding H. in the attempt.

It was contended that this verdict amounted to an acquittal of W. as the case did not fall within s. 9 of 14 & 15 Vict. c. 100, by which a person indicted for a crime may be found guilty of an attempt to commit the crime. The objection was overruled:—

Held, that the conviction should be affirmed.

CASE stated by Pigott, B.:—

Indictment, charging Hapgood with rape and Wyatt with aiding and abetting in the rape. The jury acquitted both prisoners of the felonies charged, but found them both guilty of misdemeanour, Hapgood of attempting to commit the rape, and Wyatt of aiding Hapgood in the attempt. Wyatt's counsel submitted that this finding amounted to an acquittal of Wyatt altogether, inasmuch as the case was not within 14 & 15 Vict. c. 100, s. 9. (1)

The objection was overruled and sentence passed upon him.

The question was whether Wyatt was properly convicted of misdemeanour.

No counsel appeared.

THE COURT (Cockburn, C.J., Byles and Keating, JJ., Pigott and Cleasby, BB.), affirmed the conviction.

- Conviction affirmed.

(1) 14 & 15 Vict. c. 100, s. 9, enacts:—"If on the trial of any person charged with any felony or misdemeanour, it shall appear to the jury upon the evidence that the defendant did not complete the offence charged, but that he was guilty only of an attempt to commit the same, such person shall not, by reason thereof, be entitled to be acquitted, but the jury shall be at liberty to return as their

verdict, that the defendant is not guilty of the felony or misdemeanour charged, but is guilty of an attempt to commit the same, and thereupon such person shall be liable to be punished in the same manner as if he had been convicted upon an indictment for attempting to commit the particular felony or misdemeanour charged in the said indictment. . . ."

1870 THE QUEEN v. MARTHA FALKINGHAM AND MARY FALKINGHAM.
 Jan. 22. *Evidence—Abandonment and Exposure of Infant whereby life is endangered—*
24 & 25 Vict. c. 100, s. 27.

A. and B. were indicted under s. 27 of 24 & 25 Vict. c. 100, for that they "did abandon and expose a certain child then being under the age of two years, whereby the life of the said child was endangered."

A., the mother of a child five weeks old, and B., put the child into a hamper, wrapped up in a shawl and packed with shavings and cotton wool, and A., with the connivance of B., took the hamper to M., about four or five miles off, to the booking office of the railway station there. She there paid for the carriage of the hamper, and told the clerk to be very careful of it, and to send it to G. by the next train, which would leave M. in ten minutes from that time. She said nothing as to the contents of the hamper, which was addressed, "Mr. Carr's, Northoutgate, Gisbro., with care, to be delivered immediately," at which address the father of the child was then living. The hamper was carried by the ordinary passenger train from M. to G., leaving M. at 7.45 P.M. and arriving at G. at 8.15 P.M. At 8.40 P.M. the hamper was delivered at its address. The child died, three weeks afterwards, from causes not attributable to the conduct of the prisoners.

On proof of these facts at the trial, it was objected for the prisoners that there was no evidence to go to the jury that the life of the child was endangered, and that there was no abandonment and no exposure of the child within the meaning of the statute. The objections were overruled, and the prisoners found guilty:—

Held, by the majority of the fifteen judges, that the conviction should be affirmed.

CASE stated by the Chairman of Quarter Sessions of the North Riding of Yorkshire:—

Indictment under 24 & 25 Vict. c. 100, s. 27 (1), that "Martha Falkingham and Mary Falkingham, on the 25th of August, 1869, unlawfully and wilfully did abandon and expose a certain child then being under the age of two years, whereby the life of the said child was endangered."

Mary Falkingham was the mother of the child, which was about five weeks old at the time mentioned in the indictment, at which time both prisoners were residing together at Stockton-on-Tees.

Mary Falkingham, about four months previous to the birth of

(1) 24 & 25 Vict. c. 100, s. 27, enacts:—"Whoever shall unlawfully abandon or expose any child, being under the age of two years, whereby the life of such child shall be en-

dangered, or the health of such child shall have been or shall be likely to be permanently injured, shall be guilty of a misdemeanour. . . ."

the child, had an interview with the father of the child, who was then residing at Gisborough, in this riding; at which interview they had a conversation relative to the maintenance of the child after it should be born. She told him that she would father the child on him, and that he would have to pay for it, to which he replied, "I will not pay for it, but if you send it to me I will keep it." Nothing was said by either of them as to the time at which, or the mode by which, the child was to be sent.

On the day named in the indictment, both prisoners put the child into a hamper, wrapped up in a woollen shawl and packed with shavings and cotton wool, and Mary Falkingham, with the knowledge and connivance of the other prisoner, took the hamper by a passenger-vessel on the River Tees, from Stockton, where they resided, to Middlesborough (a distance of about four or five miles). She then took the hamper to the booking office of the railway station, and left it, paying for its carriage, and telling the clerk to be very careful of it and to send it to Gisborough by the next train, which would leave Middlesborough in ten minutes from that time. She did not say anything as to the contents of the hamper. The hamper was addressed "Mr. Carr's, Northoutgate, Gisbro., with care, to be delivered immediately," at which address the father of the child was then lodging. The hamper was carried by the ordinary passenger train from Middlesborough to Gisborough, leaving the former place at 7.45 P.M. and arriving at Gisborough at 8.15 P.M. At 8.40 P.M. it was delivered by a railway porter at its address. On its being opened it was found to contain the child alive and packed in the manner before mentioned, with a paper on which was written, "Please take care of this child, for George Beaumont is the father of it." The child was taken by the relieving officer, the same evening, to the union workhouse, where it lived for three weeks afterwards, and then died from causes not attributable to the conduct of the prisoners. It was proved to have been a delicate child.

The prisoners' counsel objected that, upon these facts, there was no evidence to go to the jury that the life of the child was endangered; and secondly, that there was no abandonment and no exposure of the child within the meaning of the statute.

These objections were overruled and the case left to the jury, who found both prisoners guilty.

1870

THE QUEEN
v.
FALKINGHAM.

1870 The question was, whether the prisoners were rightly con-
 THE QUEEN victed.
 v.
 FAULKINGHAM. Nov. 13, 1869. No counsel appeared.

THE COURT (Kelly, C.B., Martin, B., Blackburn, Lush, and Brett, JJ.) reserved the case for the consideration of the fifteen judges.

Jan. 22, 1870. *Shepherd* stated that he was now instructed to appear for the prosecution. He was not heard, as the Court (Cockburn, C.J., Bovill, C.J., Kelly, C.B., Martin, B., Willes, J., Channell, B., Byles, Blackburn, Keating, and Mellor, JJ., Pigott, B., Lush, J., Cleasby, B., Hannen and Brett, JJ.) thinking that no counsel appeared, had already considered the case, and a majority of them had arrived at a conclusion in favour of the prosecution. He referred to *R. v. Bradford*. (1)

COCKBURN, C.J. A majority of the Court are of opinion that the conviction should be affirmed. We are, however, all of opinion, under the circumstances, and as this is the first case of the kind under the statute, that a lenient punishment only ought to be inflicted. We mention this as a matter for the consideration of the justices in passing sentence.

Conviction affirmed.

Attorneys for prosecution: *Pitman & Lane, for Weatherill & Lloyd, Gisborough.*

(1) Bell, C. C. 268 ; 20 L. J. (M. C.) 171.

THE QUEEN v. WILLIAM PARKER.

1870

Jun. 22.

*Evidence—Admission, after Death of Witness, of Deposition taken before Justice**—Signature by Justice—11 & 12 Vict. c. 42, s. 17—Form of Indictment—**Uncertainty—Surplusage.*

Section 17 of 11 & 12 Vict. c. 42, enacts that justices, before they commit an accused person, shall "take the statement (M.) . . . of those who shall know the facts of the case, and shall put the same into writing, and such depositions shall be read over to and signed respectively by the witnesses who shall have been so examined, and shall be signed also by the justice or justices taking the same . . . and if, upon the trial of the person so accused, it shall be proved . . . that any person whose deposition shall have been taken as aforesaid, is dead . . . then, if such deposition purport to be signed by the justice, by or before whom the same purports to have been taken, it shall be lawful to read such deposition as evidence in such prosecution, without further proof thereof." The reference (M.) is to a schedule of the Act where there is a form for these depositions, which commences with a heading containing the names of the witnesses examined, and concludes, "the above depositions of C. D. and E. F. were taken and [sworn] before me at , on the day and year first above mentioned," and then follows immediately the signature of the justice :—

Held,—overruling *Reg. v. Richards* (4 F. & F. 860),—that it is not necessary that each deposition should be signed by the justice taking it; and therefore where a number of depositions taken at the same hearing on several sheets of paper were fastened together and signed by the justices taking them, once only at the end of all the depositions in the form given in the schedule, that one of these depositions was admissible in evidence under s. 17, after the death of the witness making it, although no part of it was on the sheet signed by the justice.

An indictment charged A. with having made a false declaration before a justice that he had lost a pawnbroker's ticket, whereas he had not lost the ticket, but "had sold, lent, or deposited it with one" C. :—

Held, that the indictment was not bad for uncertainty, because the words "had sold, lent, or deposited it" were mere surplusage, and therefore an error in them did not affect the indictment.

CASE stated by Lush, J. :—

Indictment that William Parker made a false declaration before a justice of the peace, "that he, the said William Parker, had lost a certain note or memorandum, being a pawnbroker's ticket, whereas, in truth and in fact he had not lost the said ticket, but had sold, lent, or deposited it as a security to one James Carter, as he, the said William Parker, well knew."

The deposition of a deceased witness was tendered at the trial, and objected to on the ground that it did not purport to be signed

1870

THE QUEEN
v.
PARKER.

by the justices before whom it purported to have been taken, as required by 11 & 12 Vict. c. 42, s. 17. The deposition in question was the second of four depositions made at the same hearing, all of which were pinned together. Each occupied more than one sheet of paper. The justices did not sign any of the sheets on which the depositions were written, except the last (that sheet not containing any part of the deposition in question), and their signature was appended at the end of the last deposition to a statement in the following form, copied from schedule M. of 11 & 12 Vict. c. 42: "The above depositions of" (naming the several witnesses, and amongst them the deceased) "were taken and sworn before us at," &c., according to the form in the schedule. (1) The deposition was read, subject to the opinion of this Court on its admissibility.

It was objected, after the jury were sworn and charged, that the indictment was bad for uncertainty, as it alleged in the alternative that the prisoner "had sold, lent, or deposited the ticket." The objection was overruled, and the prisoner found guilty.

The questions were, whether the deposition ought to have been received, and whether the indictment was bad.

(1) 11 & 12 Vict. c. 42, s. 12:—Where any person shall appear before justices, charged with any indictable offence, such justices, before they shall commit such person or admit him to bail, "shall in the presence of such accused person, who shall be at liberty to put questions to any witness produced against him, take the statement (M.) on oath or affirmation of those who shall know the facts and circumstances of the case, and shall put the same into writing, and such depositions shall be read over to and signed respectively by the witnesses who shall have been so examined, and shall be signed also by the justice or justices taking the same . . . and if upon the trial of the person so accused . . . it shall be proved . . . that any person whose deposition shall have been taken as aforesaid is dead . . . then, if such deposition purport to be

signed by the justice by or before whom the same purports to have been taken, it shall be lawful to read such deposition as evidence in such prosecution without further proof thereof. . . ."

The schedule M., referred to in this section, gives a form in which depositions are to be taken.

The form commences: "The examination of C. D. of [farmer], and of E. F. of [labourer], taken on [oath] this day of , in the year of our Lord , at , in the county of , before the undersigned [one] of Her Majesty's justices of the peace," and concludes, "The above depositions of C. D. and E. F. were taken and [sworn] before me at , on the day and year first above written." Then follows immediately the signature of the justice.

The case was argued before Cockburn, C.J., Byles and Keating, JJ., Pigott and Cleasby, BB.

1870

THE QUEEN
v.
PARKER.

Greenhow, for the prisoner. The first question is whether each deposition ought to be signed by the justices taking it, or whether one signature by the justices is enough for all the depositions taken at one time. The wording of the section shews that each deposition should be signed by the justices, because a deposition is not evidence unless "such deposition" (in the singular) "purport to be signed by the justices." The deposition in this case did not purport to be so signed, and therefore was not admissible. It may be difficult to reconcile the wording of the section with the form given in the schedule; but if they differ, the Court will be bound by the terms of the section; especially in a case like this, where the section ought to receive a strict construction. In *Reg. v. Lee* (1), Pollock, C.B., held that it was not necessary that each deposition should be signed by the justice; but Cockburn, C.J., in *Reg. v. Richards* (2), dissented from this construction of the section.

[COCKBURN, C.J. When I so decided, the words of s. 17 only were brought to my notice, but I was not referred to the form of the schedule, as should have been done. Having subsequently referred to the schedule, I think that the opinion I expressed in *Reg. v. Richards* (2) was wrong.]

In *Reg. v. Johnson* (3), Alderson, B., appears to have thought that each deposition must be signed by the justice. The other cases on this point, viz., *Reg. v. Young* (4), *Reg. v. Osborne* (5), are against this view. He also referred to *Reg. v. France*. (6)

Secondly. The indictment is bad for uncertainty, as it charges the prisoner with having "sold, lent, or deposited" the ticket. There is no definite charge in these words. It is possible that it may not have been necessary to insert any such words after stating that the ticket was not lost; but as they are inserted they must state the charge with certainty according to the ordinary rules of criminal pleading. He referred to *Reg. v. Jones*. (7)

(1) 4 F. & F. at p. 65.

(5) 8 Car. & P. 113.

(2) 4 F. & F. 860.

(6) 2 M. & R. 207.

(3) 2 C. & K. 354.

(7) 1 C. & K. 243.

(4) 3 C. & K. 106.

1870

THE QUEEN
v.
PARKER.

COCKBURN, C.J. I am of opinion that the conviction should be affirmed, as both the objections fail. The first question is as to the signature of the depositions. The cases of *Reg. v. Lee* (1), and *Reg. v. Young* (2), are both authorities that depositions signed as the depositions in this case were signed are admissible in evidence. In *Reg. v. Richards* (3), the case before me, my attention was called to the wording of s. 17 of 11 & 12 Vict. c. 42, but not to the form of the schedule. On the wording of the section, which is somewhat ambiguous, and which I thought should be construed strictly, I was of opinion that each deposition should be signed by the justices taking it as well as by the witness. My attention was subsequently called to the cases decided upon this section, and to the form of the schedule which should have been brought to my notice at the time. I now think, reading the section by the light of the schedule, that it is not necessary that each deposition should be signed by the justice. The schedule seems to make the signature of the justice apply to all the depositions taken. It says, "the above depositions" (in the plural) "of C. D. and E. F. were taken before me," &c. It therefore seems to me plain that the legislature did not intend to require that each deposition should be signed by the justice. I therefore came to the conclusion that my decision in *Reg. v. Richards* (3) was wrong. I am now of opinion that it is sufficient if the depositions are signed in the manner prescribed in the schedule, and as the deposition in this case was so signed, I think it was properly admitted in evidence.

The second objection also fails. I do not wish to infringe the rule, that when an indictment sets forth the substantial nature of the offence, the prosecution must prove the offence as so stated. When, however, the indictment contains mere surplusage, and facts constituting a complete offence are sufficiently stated without such superfluous words, the indictment is not bad if that surplusage is erroneously stated. The essence of the offence here is the false statement before the justice, that the prisoner had lost the ticket, "whereas he had not lost the said ticket." The indictment would have been sufficient, if it had stopped there. The indictment, however, goes on and states something more in the alternative, and in an inconsistent manner, because the prisoner

(1) 4 F. & F. at p. 65.

(2) 3 C. & K. 106.

(3) 4 F. & F. 860.

could not have sold, lent, and lost the ticket. If it were essential that there should be a statement as to what the prisoner had done with the ticket, then there would be great force in the argument that has been addressed to us on this point. As, however, these words are mere surplusage, an error in them does not affect the indictment.

1870

THE QUEEN
v.
PARKER.

BYLES, J. I am of the same opinion. The signature of the justice is the signature to the depositions as then attached together. If all the depositions are on one sheet, one signature by the justice is clearly sufficient. There the connection of the depositions is created by the sheet of paper. Does it make any difference if they are connected together by tape, or string, or in any other way?

As to the second point, the words objected to are clearly surplusage. The prosecution can seldom know what has been done with tickets in such a case as this, and these words need not have been in the indictment.

KEATING, J. I am of the same opinion. The form given by the schedule has been strictly complied with, and the depositions appear to have been fastened together when signed by the justices.

PIGOTT, B. I am of the same opinion. We should, no doubt, be careful not to relax the restrictions under which depositions are made evidence in some cases in the absence of the witness who made them. The form given by the schedule has, however, been complied with in this case, and all the depositions are under one caption, and one signature is sufficient.

As to the second point, the averment objected to is useless, and may therefore be altogether rejected as mere surplusage.

CLEASBY, B. I also think the conviction should be affirmed. The statute (11 & 12 Vict. c. 42, s. 17) requires that each deposition is to be signed by the witness making it, but the one signature by the justice is sufficient, as each deposition is expressly referred to in the form given for his signature in the schedule. It is clear also that if there is a defect in stating a matter which it is not necessary to prove, the indictment is not thereby vitiated.

Conviction affirmed.

Attorneys for prosecution: *J. & R. Holtby, York.*

1870

Jan. 29.

THE QUEEN v. STAINER.

*Friendly Society—Rules in Restraint of Trade—Illegality—Embezzlement—
Right to the Protection of the Criminal Law.*

S., an officer of a friendly society, some of whose rules were in restraint of trade, embezzled their money :—

Held, that rules in restraint of trade are not criminal, although they may be void as being against public policy, and that societies having such rules are entitled to the protection of the criminal law for their funds, and, consequently, that S. might properly be convicted of embezzlement.

CASE stated by the Chairman of the Worcestershire Quarter Sessions :—

At the Worcestershire quarter sessions James Stainer was tried on a charge of embezzling money received by him on account of the Power Loom Carpet Weavers' Mutual Defence and Provident Association of Kidderminster and Stourport.

The rules of the society were not enrolled or certified under the Friendly Societies' Acts. (1)

(1) The society was established many years ago under a set of rules. In March, 1868, these rules were revised, and such revised rules had since been in force, and defined the object and constitution of the society, and the duties of its several officers. A copy of each set of rules was made a part of the case. The only rules to which reference was made were the following revised rules :—

2. "That the object of this society shall be: The attainment and maintenance of a fair remuneration for labour, the regulation of the supply of hands and hours of work, to render assistance in cases of sickness, accident, or death, and generally to promote the interest of the members."

18. "A secretary shall be appointed to keep the accounts and to manage the affairs in each firm connected with this association. The appointment of such officers to rest with the members

employed at such firms. Such secretaries' duties shall be to collect and pay over at head-quarters all contributions, levies, fines, &c., to arrange for the proper discharge of all claims, and generally to conduct the business of this society in their respective shops. They shall receive for their services 2½ per cent. on all moneys collected by them for the purposes of this society."

30. "The hours of work allowed by the Factory Acts shall be the recognized work-hours for members of this society, and any member infringing on such hours by working overtime—that is, by working before six o'clock in the morning, after six in the evening, after two o'clock on Saturdays, or meal hours—shall be fined 2s. 6d., and shall likewise be suspended from all the privileges of membership for twelve months."

34. "Should any member of this society seek to damage the interests of

The prisoner was a member of the society, and was duly appointed what was called a local secretary, to keep the accounts and collect the contributions of members of the society employed at the works of Messrs. Dixon & Co., of Kidderminster, and he acted, under the 18th rule, as such local secretary, until the embezzlement charged against him was discovered, and it was in respect of money received by him, as such local secretary, that the charge of embezzlement arose. It was proved that the 34th and 35th rules had never been acted upon, that the 37th rule had been acted upon with respect to the clearance card therein mentioned, but not otherwise, and that the 36th rule had never been acted upon, except that two members who had each, at different times, taken a son into their working shed to learn weaving, contrary to the provisions of the 36th rule, were told that they would have to pay the fine mentioned in the rule, and both left the society to avoid such payment. It was also proved that the society had occasionally contributed towards the support of men out on strike, and that at Christmas, 1866, a sum of 90*l.* was given to men out on strike at Stourport, and that on one occasion since, on May 13, 1868, 5*l.* per week was voted to men out on strike.

Except as above mentioned, no evidence was given at the trial of any application of the funds of the society towards the support

1870
THE QUEEN
v.
STAINER.

the association by proposing to divide the funds, or otherwise conduct himself so as to injure the members, he shall be cautioned by the committee; and if he persists in his offensive conduct after such caution, he shall be put under suspension, and shall forfeit his right to the privileges of membership during the space of three months."

35. "Any member of this association making an application for work at a firm where there is no vacancy, and thereby creating that spirit-crushing influence which all good men deplore, shall upon proof of the offence be fined 2*s.* 6*d.* in each and every case, such fines to be placed to the offender's arrears."

36. "Any member of this society

taking a person into a shop to learn the weaving, where no vacant loom exists, and against the expressed wishes of his shopmates, shall be fined 2*s.* 6*d.*, and shall likewise be suspended from all the privileges of membership for twelve months."

37. "Should any member leave one firm to work at another, he shall get a clearance card to certify his position with respect to this society; and if he be in arrears of his contributions, levies, fines, &c., he shall pay in the same to the secretary acting for the shop wherein he has obtained employment; and any member producing a false certificate shall be fined 1*s.*, and any secretary wilfully drawing up a false certificate shall be expelled from his office."

1870
THE QUEEN
v.
STAINER.

of men on strike, or for any illegal purpose. There were between 500 and 600 members of the society, and their funds exceeded 2000*l*.

At the close of the case for the prosecution, it was objected, on behalf of the prisoner, that the society was proved to have been established, in part at least, for an illegal object, and that the prisoner ought to be acquitted. Rules 30, 35, 36, and 37 were principally relied upon as shewing the alleged illegality. The objection was overruled, and the jury returned a verdict of guilty.

The question was whether such objection was valid in point of law, and entitled the prisoner to be acquitted.

The case was argued before Cockburn, C.J., Byles and Keating, JJ., Pigott and Cleasby, BB.

Jan. 22, 1870. *Streeten* (*Jelf* with him), for the prisoner. The question is, whether the prisoner has committed the statutory crime of embezzlement. The essence of this crime is that there should be a service between the accused and the person whose money he is charged with embezzling. There can be no embezzlement in the course of an illegal service, or of any service forbidden or not recognized by law. This society is an illegal society, as several of its rules are in direct restraint of trade, especially rules 35 and 36. (1) Such rules are illegal: *Hilton v. Eckersly* (2); *Hornby v. Close* (3); *Farrer v. Close*. (4) They are illegal in the sense of being criminal: *Hilton v. Eckersly*. (5) The members of this society might be indicted for a conspiracy at common law, because an agreement to impede the free course of trade is a criminal offence, and the servant of such a society cannot be convicted of embezzling their funds: *Reg. v. Hunt*. (6) Even if this society is not criminal, it is still clearly illegal in the sense that its rules, being in restraint of trade, are void, and cannot be enforced, and there was, therefore, no legal service by the prisoner, who acted under one of the society's rules. There being no legal service, no action for money had and received would lie by the society

(1) Ante, p. 231, n.

(2) 6 E. & B. 47, 53; 24 L. J. (Q.B.) 353; 25 L. J. (Q.B.) 199.

(3) Law Rep. 2 Q. B. 153.

(4) Law Rep. 4 Q. B. 602.

(5) 6 E. & B. at p. 53; 24 L. J. (Q.B.) at p. 355.

(6) 8 C. & P. 642.

against the prisoner to recover money received by the prisoner as secretary: Broom's Legal Maxims, 4th ed. p. 702. Consequently the prisoner cannot have been guilty of embezzling the society's money. The statute of last session (32 & 33 Vict. c. 61) does not apply to this case. It only provides that certain societies registered under the Friendly Societies Act (18 & 19 Vict. c. 63) may have the benefit of that Act, although they may have rules regulating the terms on which they will consent to be employed.

1870

THE QUEEN
v.
STAINER.

Jan. 29. *J. O. Griffiths*, for the prosecution. No doubt if this society is a criminal society, the conviction cannot be sustained; but if it is only illegal, in the sense that some of its rules can not be enforced, the conviction should be affirmed. There is no authority for saying that the members of this society could be indicted for a conspiracy, and in the absence of authority it must be assumed that they could not be so indicted. 32 & 33 Vict. c. 61, allows associations having rules in restraint of trade to have the benefit of the summary procedure under s. 24 of the Friendly Societies Act (18 & 19 Vict. c. 63) for the punishment of those misapplying their funds. The legislature cannot have intended that this right should be enjoyed by criminal societies. It cannot be that these societies are able to proceed in a summary way before justices, and yet be unable to indict at the assizes. This society is therefore not a criminal society.

The fact that some of its rules are void does not affect this question. The society is a partnership constituted by a contract partly in restraint of trade. Such a contract is divisible; a part may be held void, and part legal: *Price v. Green* (1); and the cases collected in Chitty on Contracts, 8th ed. p. 614. The clerk of a friendly society may be convicted of embezzlement, although the business of the society was not conducted according to the statute: *Reg. v. Miller*. (2) [He also referred to *Reg. v. Redford* (3), and *Reg. v. Tongue*. (4)] The society could have maintained an action against the prisoner for money had and received to their use: *Tenant v. Elliott* (5); *Sharp v. Taylor*. (6)

(1) 16 M. & W. 346.

(2) 2 Moo. C. C. 249.

(3) 21 L. T. (N. S.) 508.

(4) Bell, C. C. 289; 30 L. J. (M. C.) 49.

(5) 1 B. & P. 3.

(6) 2 Phill. 801.

1870

Streeten, in reply. (1)

THE QUEEN
v.
STAINER.

COCKBURN, C.J. I see nothing to affect the validity of this conviction, and it must therefore stand. It is unnecessary to consider how far the criminal purposes of a society might affect its title to property. In this society there is nothing criminal either in its purposes or its operation. Its primary objects are laudable. There are, however, one or two rules with reference to the seeking of employment, and other matters, which would come within the purposes of a trades union. According to *Hornby v. Close* (2), and *Hilton v. Eckersly* (3) in the Exchequer Chamber, these purposes are illegal, and the rules and contracts relating to them are void, as being in restraint of trade. In these cases, however, the Court carefully abstained from saying anything as to the criminality of such rules or contracts. Contracts, illegal in one sense, as being void because in restraint of trade, are not, therefore, necessarily criminal.

I think there is no doubt now that a society like this one is not criminal since the passing of the recent statute 32 & 33 Vict. c. 61, by which associations having rules as to the terms on which they will consent to be employed, shall not, by reason that such rules may operate in restraint of trade, lose the benefits of the summary procedure given by s. 24 of the Friendly Societies Act (18 & 19 Vict. c. 63), against persons misapplying their funds. Mr. Streeten says, that this statute only applies to societies registered under the Friendly Societies Act. This statute is, however, at all events an indication of the intention of the legislature, that trades unions shall have rights of property which are to be protected by the criminal law. I think, therefore, that it is clear, that societies such as this are not criminal, because the legislature could never have intended that a criminal society should have the benefit of the Friendly Societies Act. It is absurd to suppose that it was intended that these societies should be able to prosecute before justices those who had embezzled their money, and yet should not be able to indict a criminal at the assizes. The recent statute is

(1) In addition to the cases cited, see *Reg. v. Dodd* (18 L. T. (N.S.) 89), and *Rex v. Stratton* (1 Camp. 549, n.)

(2) Law Rep. 2 Q. B. 153.
(3) 6 E. & B. 53; 25 L. J. (Q.B.) 199.

equivalent to a declaration by the legislature, that societies having rules in restraint of trade, have no defect on that account in their title to property in proceedings in criminal law.

1870

THE QUEEN
v.
STAINER.

BYLES, J. I am of the same opinion. Some of the objects of this society may be unlawful, as being in restraint of trade, and so void, but the objects are not criminal. I agree with the reasons already given by the Lord Chief Justice.

KEATING, J. I am also of the same opinion. The only illegality suggested in this case, is the object of one or two rules which are in restraint of trade. It may be impossible to enforce these rules, as being illegal, in the sense of being void, but are they within the criminal law? Is the illegality such as to deprive the funds of the society of the protection given by the criminal law? I think not. I think that the society is entitled to that protection.

I agree with what the Lord Chief Justice has said with regard to the late statute (32 & 33 Vict. c. 61). It may be that it applies directly only to registered societies; still, that statute is a clear indication that the legislature did not intend that societies having rules in restraint of trade should be treated as illegal societies, so as not to be entitled to the protection of the criminal law. It has been argued that the members of any society having rules in restraint of trade are liable to be indicted for conspiracy at common law. No authority, however, for this proposition has been cited, and in the absence of any authority I think we must assume that they would not be liable to such an indictment. The tendency of the legislature for some time past has been to protect such societies as these, when conducted without violence or molestation of those who are not members. It may also be noticed that the last statute (32 & 33 Vict. c. 61) is called an "Act to protect the funds of trades unions from embezzlement and misappropriation," and is to be cited as the "Trades Unions Funds Protection Act." There can, therefore, be no doubt that the legislature intended to give to the funds of trades unions the protection of the criminal law.

PIGOTT, B. I think the conviction should be affirmed. The objection to this conviction is, that the society cannot possess

1870
THE QUEEN
v.
STAINER.

property because it is an illegal society. The alleged illegality is caused by two or three rules in restraint of trade. Such illegality does not, however, prevent their rights of property from being recognized in criminal proceedings. The legislature has expressly recognized such right of property in the last statute (32 & 33 Vict. c. 61), by which societies having rules in restraint of trade can take proceedings before justices, under the Friendly Societies Act (18 & 19 Vict. c. 63, s. 24).

CLEASBY, B. I am of the same opinion. The foundation of the argument against the conviction is, that this society could have no servants. I think this is not the law. Such a society may have servants, and can proceed criminally against such servants if they embezzle the society's money.

Conviction affirmed.

Attorneys for prosecution : *Miller & Corbet, Kidderminster.*

Attorney for prisoner : *H. Saunders, Kidderminster.*

END OF HILARY TERM, 1870.

CASES

DETERMINED BY THE

COURT FOR CROWN CASES RESERVED

IN

EASTER TERM, XXXIII VICTORIA.

THE QUEEN v. THE INHABITANTS OF THE UPPER HALF
HUNDRED OF CHART AND LONGBRIDGE.

1870
April 30.

*Bridge—Repair by Hundred—Highway Act, 1835 (5 & 6 Wm. 4, c. 50), s. 5—
Construction—"Highways"—"County Bridge"—"Hundred Bridge."*

The Highway Act, 1835, provides for the repair of highways in a specified manner not at the expense of the hundreds. By s. 5, "highways," in the construction of the statute, "shall be understood to mean all roads, bridges (except county bridges), carriageways, cartways," &c., &c. :—

Held, that "county bridges" includes hundred bridges, and consequently that hundred bridges are not highways under the Highway Act, 1835, and, therefore, that hundreds are not relieved by that Act from liability to repair hundred bridges.

Semble, that even if hundred bridges were not included in "county bridges," hundreds would not be relieved by the Highway Act, 1835, from their liability to repair hundred bridges, as there are no negative words in the statute to relieve hundreds from that liability.

CASE stated by the Chairman of the Kent Quarter Sessions.

On the 29th of June, 1869, J. Adams and C. Tanton, as representing the inhabitants of the Upper Half Hundred of Chart and Longbridge, in the county of Kent, were tried upon an indictment which charged the inhabitants with permitting one of the hundred bridges to be out of repair. The bridge in question was situate within the Upper Half Hundred of Chart and Longbridge; it was out of repair, and dangerous; and, from time immemorial, the repairs

1870

THE QUEEN
v.
CHART AND
LONGBRIDGE.

of that bridge, and of all other hundred bridges within the Upper Half Hundred, had always been done at the expense of the inhabitants of the Half Hundred out of a hundred rate made and levied in the Half Hundred.

Primâ facie, everything was proved which would entitle the Crown to a verdict. But it was contended, on the part of the defendants, that since the Highway Act, 1835 (5 & 6 Wm. 4, c. 50), hundred bridges are repairable as highways by the parishes in which they are respectively situate, and that the inhabitants of any hundred or other division of a county are no longer indictable for the non-repair of such bridges.

The jury found the defendants guilty.

The question was, whether a public bridge which has from the time whereof the memory of man runneth not to the contrary been repaired by a hundred, is, since 5 & 6 Wm. 4, c. 50, not repairable by the hundred.

The case was argued before Bovill, C.J., Willes, Byles, and Hannen, JJ., and Cleasby, B.

Biron, for the defendants. 5 & 6 Wm. 4, c. 50, provides for the repair of highways by the parishes within which they are situate, and hundreds are not liable for such repairs. If the bridge in this case is a highway within the meaning of the statute, the conviction must be quashed. This depends on whether s. 5 (1) of 5 & 6 Wm. 4, c. 50, includes hundred bridges in the word "highways" as there defined. By s. 5, "highways" includes all bridges not being county bridges. This bridge is a hundred bridge, and not a county bridge, and therefore is a highway. There is a clear distinction between hundred and county bridges. Hundred bridges are the bridges of lesser importance, which the hundred is liable to repair, and the county bridges are those bridges in a county of greater importance, which the county is liable to repair. The legislature has recognized this distinction. The old Highway Act (13 Geo. 3, c. 78) made no alteration in the liability to repair bridges; but

(1) Section 5 of 5 & 6 Wm. 4, c. 50, enacts that "in the construction of this Act . . . the word 'highways' shall be understood to mean all roads, bridges

(not being county bridges), carriage-ways, cartways, horseways, bridleways, footways, causeways, churchways, and pavements . . ."

43 Geo. 3, c. 59, contains enactments respecting county bridges. 54 Geo. 3, c. 90, recites 43 Geo. 3, c. 59, and enacts that its provisions shall extend to hundred bridges as well as to county bridges. 55 Geo. 3, c. 143, mentions hundred bridges *eo nomine*. These statutes shew that there was a well-ascertained legal distinction between county and hundred bridges at the time of the passing of the Highway Act, 1835. Sections 58 and 62 of that Act shew that the liability, *ratione tenuræ*, is not abolished, and a clause might have been introduced respecting the liability of hundreds; but there is no such clause. [He also referred to *Reg. v. Merionethshire* (1), and *Reg. v. Brecon*. (2)]

Barrow, for the prosecution, was stopped by the Court.

BOVILL, C.J. In dealing with 5 & 6 Wm. 4, c. 50, it is necessary to consider what was the state of the law previous to that statute. There were then statutes relating to highways, and statutes relating to bridges. 5 & 6 Wm. 4, c. 50, is a statute for consolidating the law as to highways. It does not refer to the statutes relating to bridges, but only to those which relate to highways. It is true that in the interpretation clause (s. 5) we find it provided "that the word 'highways' shall be understood to mean all roads, bridges (not being county bridges), carriageways, cartways," &c. It has been argued that the word "highways" under this definition includes hundred bridges. If we were dealing with a legal term, and the expressions county bridge, hundred bridge, borough bridge, or liberty bridge, were known to the law, there might be some foundation for the argument. County bridge, however, is an expression not known to the law. It is merely a compendious way of speaking of a public bridge which the county is liable to repair. In an indictment for the non-repair of a county bridge, it is not stated that the bridge is a county bridge, but that it is a bridge which the county is liable to repair. (3) A county bridge is, therefore, a public bridge which the county is liable to repair. The liability to repair a public bridge may however be imposed upon a hundred or a division, or a borough, or on one or more

1870

THE QUEEN
v.
CHART AND
LONGBRIDGE.

(1) 6 Q. B. 343.

(2) 15 Q. B. 813; 18 L. J. (M.C.)

(3) See the form of indictment in Arch. Cr. Pl. 16th ed. 850.

1870

THE QUEEN
v.
CHART AND
LONGBRIDGE.

individuals. All public bridges are county bridges, although they may be repairable by the hundred, or borough, or division, or by individuals instead of by the county. It is true that in some statutes a distinction is drawn between county bridges and hundred bridges. 43 Geo. 3, c. 59, mentions "county bridges," and the words "hundred bridge" do not appear; but that Act only deals with bridges which counties are liable to repair. 54 Geo. 3, c. 90, deals with the repair of bridges repairable by hundreds or divisions, and it therefore specifically mentions these bridges, and extends to them the provisions of 43 Geo. 3, c. 59, with respect to county bridges. In 55 Geo. 3, c. 143, it was necessary to distinguish between county and hundred bridges. There is, however, no general distinction between county bridges and hundred bridges.

I am of opinion, therefore, that the interpretation clause (s. 5) of the Highway Act, 1835, includes in the words "county bridges" all public bridges, although they may be repairable by divisions other than the county. It might as well be said, in a case where a township is liable to repair a highway, that such highway was not a parish highway, because not repairable by the parish, as to say that a public bridge is not a county bridge, because not repairable by the county, but by the hundred.

With respect to the other parts of 5 & 6 Wm. 4, c. 50, I will only add that there is nothing in the statute to take away the liability of the hundred which existed formerly. The general rule is, that affirmative words do not take away such a liability as this. It is necessary that there should be some negative words to do so. It is not, however, necessary to consider this point, because the other reasons which I have given are sufficient for holding that 5 & 6 Wm. 4, c. 50, does not relieve the Upper Half Hundred of Chart and Longbridge from their liability to repair the bridge in question.

WILLES, BYLES, and HANNEN, JJ., and CLEASBY, B., concurred.

Conviction affirmed.

Attorneys for prosecution: *Kingsford & Dorman, for Fraser, Ashford.*

Attorneys for defendants: *Furley, Hallett, & Creery, Ashford.*

THE QUEEN v. JOHN GUTHRIE.

1870

May 7.

Indictment—Charge in one count of Assaulting and also of carnally knowing a Girl between the Age of Ten and Twelve Years—Verdict of Common Assault—Practice—Duplicity.

Indictment, that the prisoner "in and upon one D., a girl above the age of ten years and under the age of twelve years . . . unlawfully did make an assault, and her, the said D., did then unlawfully and carnally know and abuse against the form of the statute," &c., &c.

The offence of carnally knowing the girl was disproved, but the jury found the prisoner guilty of a common assault:—

Held, that the prisoner might be properly convicted of a common assault, on the ground that the indictment charged two distinct misdemeanours, viz., of assaulting and also of carnally knowing D., and that the prisoner might be found guilty of either of them.

CASE stated by the Chairman of Quarter Sessions for the County Palatine of Durham.

Indictment "that John Guthrie on the 24th of December, A.D. 1869, in and upon one Margaret Davidson, a girl above the age of ten years and under the age of twelve years, to wit, of the age of ten years and three days, unlawfully did make an assault, and her, the said Margaret Davidson, did then unlawfully and carnally know and abuse against the form of the statute in such case made and provided, and against the peace," &c.

There was no other count in the indictment.

Guthrie was tried on this indictment on the 4th of April, 1870. The offence of carnally knowing and abusing the girl was disproved, but there was evidence of an assault of an indecent and very violent character, which was left to the jury, who found Guthrie guilty of a common assault.

The question was, whether Guthrie could be properly convicted on this indictment of a common assault.

The case was argued before Bovill, C.J., Willes, Byles, and Hannen, JJ., and Cleasby, B.

No counsel appeared for the prisoner.

J. Edge, for the prosecution. This indictment is under 24 & 25

1870

THE QUEEN
v.
GUTHRIE.

Vict. c. 100, s. 51 (1), and the words "did make an assault" are not necessary in charging the offence specified in this section. The indictment therefore contains two distinct charges, both misdemeanours, viz., a common assault and an offence under the section. The statutory offence may be committed although the girl consented, and a charge of assault is therefore not included in the charge of the statutory offence. A conviction for either of the misdemeanours charged may be good. The objection to the indictment, if any, could only be taken at the trial on the ground of duplicity. This was decided in *Nash v. Reg.* (2), where it was held that no objection can be taken after verdict to a count which charges two distinct offences. In *Reg. v. Bankes* (3) and *Reg. v. Cockburn* (4) it seems to have been assumed that on an indictment for carnally knowing a girl under ten years of age, the prisoner might be found guilty of a common assault if an assault were charged in the count, and found by the evidence to have been committed. In *Rea v. Withall* (5) prisoners indicted in one count for burglary and stealing money were found guilty of the stealing only, and it was held that this conviction was good. It has also been held that when the offence charged in a count necessarily includes a lesser offence, the prisoner may be convicted of such lesser offence, although it is not specifically charged: *Reg. v. Ingram* (6); *Reg. v. Oliver* (7); *Reg. v. Yeadon* (8); *Reg. v. Taylor*. (9) He also referred to *Rea v. Dawson*. (10)

BOVILL, C.J. I am of opinion that this conviction should be affirmed. The indictment charges that the prisoner "did unlawfully and carnally know and abuse" the girl against the form of the statute; and it also charges an offence at common law, viz.: an assault. If any objection could be taken to this indictment, it

(1) S. 51 of 24 & 25 Vict. c. 100, enacts that "whosoever shall unlawfully and carnally know and abuse any girl being above the age of ten years and under the age of twelve years, shall be guilty of a misdemeanour."

(2) 4 B. & S. 935, 944; 33 L. J. (M.C.) 94, 97.

(3) 8 C. & P. 574.

(4) 3 Cox, 543.

(5) 1 East, P. C. 517.

(6) 1 Salk. 384.

(7) Bell, C. C. 287; 30 L. J. (M.C.) 12.

(8) Leigh and Cave, 81; 31 L. J. (M.C.) 70.

(9) Ante, p. 194.

(10) 8 Stark. 62.

could only be on the ground of duplicity. I think, however, that there is no good ground for such an objection. There is, no doubt, a difference between the evidence necessary to convict for an assault and the evidence necessary for a conviction of the statutory offence charged in the indictment. The statutory offence may be committed, although there is consent; but if there is consent there cannot be an assault. In this indictment the substantive common law offence of an assault was charged, and there is no ground for not convicting for that which is thus distinctly charged, although another and a more serious charge follows it. The cases of *Reg. v. Oliver* (1), *Reg. v. Ingram* (2), and *Reg. v. Taylor* (3), are sufficient authorities for thus holding. I give this judgment on the ground that there is a distinct charge of an assault in the indictment as well as of a more serious crime, and I think that the charge of the latter crime does not prevent a conviction for the assault, which is also charged and has been proved.

1870
THE QUEEN
v.
GUTHRIE.

WILLES, J., concurred.

BYLES, J. I cannot say that I am quite free from doubt, but I have not sufficient doubt to induce me to dissent from the rest of the Court.

CLEASBY, B. I am of opinion that the conviction was right. It occurred to me during the argument that the indictment, in effect, only contained one charge, viz., of unlawfully and carnally knowing and abusing; but I think now that it contains also a second charge, viz., of assaulting.

HANNEN, J., concurred.

Conviction affirmed.

Attorneys for prosecution: *Shum & Crossman, for J. Watson, Durham.*

(1) Bell, C. C. 287; 30 L. J. (M.C.) 12.

(2) 1 Falk. 384.

(3) Ante, p. 194.

1870

May 7.

THE QUEEN v. ELIZABETH BROWN.

Evidence—24 & 25 Vict. c. 100, s. 60—“*Secret Disposition of Dead Body of Child.*”

Indictment for endeavouring to conceal the birth of a child by secretly disposing of the dead body thereof.

S. 60 of 24 & 25 Vict. c. 100, enacts that “if any woman shall be delivered of a child, every person who shall by any secret disposition of the dead body of the child, . . . endeavour to conceal the birth thereof, shall be guilty of a misdemeanour . . .”

The prisoner put the dead body of her child over a wall 4½ feet high, which divided a yard from a field. The yard was at the back of a public house, and was used by the occupiers of that and three other houses. There was no thoroughfare into or through the yard, and no entrance into it except by a narrow passage from the street. The prisoner did not live in any of the four houses that had the use of the yard, and she must have passed from the street into the yard in order to throw the body over the wall. A person looking over the wall from the yard would see the body, but persons going through the yard or using it in the ordinary way, would not see the body. The field was a grass-field used by a butcher for grazing. The field had no gate except from the butcher's yard, and there was no public path through the field, nor any path in the field that would take any one within sight of the body. No person going into the field in their ordinary occupation, would go near the body or see it, nor would they see it unless they went up to the part of the wall where the body lay. The body was found by chance by a child. There was nothing on or over the body, and nothing to conceal it except its situation :—

Held, that there was evidence to go to the jury of a “secret disposition” of the body under s. 60 of 24 & 25 Vict. c. 100.

CASE stated by Brett, J. :—

The prisoner was tried at Newcastle at the last spring assizes for Northumberland, for endeavouring to conceal the birth of her child by secretly disposing of the dead body thereof.

The evidence as to the disposition of the body was that the prisoner had put the body over a wall near which it was found. That the wall was 4½ feet high, dividing a yard from a field; the yard was at the back of a public house, used for the convenience of that house and three other tenements by the occupiers thereof. There was no thoroughfare into or through the yard, and no other entrance to it than by a narrow passage from the street. The prisoner, who did not live at the public house or at any of the tenements, must have passed from the street into the yard in order to throw the body over the wall into the field. A person looking

1870

 THE QUEEN
 v.
 BROWN.

over the wall from the yard would see the child, but persons going through the yard or using it in the ordinary way, would not see the child, the wall would hide the child from such persons. The field in which the body was found was a grass-field used by a butcher to graze cattle. It was a field with no gate into it from any road or from the public house yard, but with a gate from the butcher's own yard. There was no public path through the field, and there was no track or path in the field which would take any one within sight of the body. No person going into the field in their ordinary occupation would go near the body or see it. No one in the field would see it unless they went accidentally or in search up to the part of the wall where the body lay. A little girl, picking flowers in the field, went accidentally to the wall and found the body; it was close to the wall, as near to it as it could possibly be; it seemed as if it had been thrown over the wall; there was blood on the wall; the body was lying on its face, at twenty yards from the gate, naked, with nothing on or over it, nothing to conceal it but its situation in the field and the wall.

It was contended, on behalf of the prisoner, that there was no evidence of a secret disposition of the dead body. Upon this part of the case the following question was left to the jury.

Did the wall and the position of the child in the field and with regard to the wall, and the mode in which the field and the yard were used, conceal the body from all the world, unless from a person who by searching for the child might find it, or by going out of the way in the field, or by looking over the wall, might accidentally discover it. If they found an answer in the affirmative they might find that there was a secret disposition of the body, but if they found an answer in the negative, they could not find that there was a secret disposition.

The jury found the prisoner guilty.

The question was, first, whether there was any evidence of a secret disposition of the dead body of the child within the meaning of the statute (1); and, secondly, whether, if there was such

(1) S. 60 of 24 & 25 Vict. c. 100, dead body of the said child . . . endeavour to conceal the birth thereof, shall be guilty of a misdemeanour. . . .

1670 evidence, the form in which the question was left to the jury was
 THE QUEEN wrong in law.

v.
 BROWN.

The case was argued before Bovill, C.J., Willes, Byles, and Hannen, JJ., and Cleasby, B.

No counsel appeared for the prisoner.

Ridley, for the prosecution. It must be taken on this case that there was a criminal intent to "endeavour to conceal the birth" within the meaning of the section, and the question, therefore, now is, was there *any* evidence to go to the jury of a "secret disposition" of the body? The test is, was there any probability that the body would be found in the place where it was put? Here it was not probable that the body would be found, and there was, therefore, a secret disposition. In *Reg. v. Sleep* (1), the prisoner had placed the dead body of her child in an open box in her bedroom. Byles, J., told the jury that "secrecy was the essence of the offence," but left it to the jury to say whether there was a secret disposition. In *Reg. v. Cook* (2) the facts resemble very closely those of *Reg. v. Sleep* (1), which was cited, and Lush, J., there assented to the ruling in *Reg. v. Sleep* (1), but said, "but then all the attendant circumstances of the case must be taken into consideration." The case was left to the jury, who found the prisoner guilty. In *Reg. v. Nixon* (3), it seems to have been held that there was no secret disposition of a body, by placing it in an open pound surrounded by a wall five feet high. There, however, there was a public pathway along the wall, so that any one who passed could see the body. There was there a probability that the body would be found, but in this case there was no such probability.

BOVILL, C.J. The first question is whether there is any evidence of a "secret disposition" of the body within the statute, 24 & 25 Vict. c. 100, s. 60. It seems to me that what is a secret disposition must depend upon the circumstances of each particular case. The most complete exposure of the body might be a concealment. As, for instance, if the body were placed in the middle of a moor in the winter, or on the top of a mountain, or in any other secluded

(1) 9 Cox, 559.

(2) 22 L. T. (N. S.) 216.

(3) Cited in *Reg. v. Clarke*, 4 F. & F. 1040, n.

place, where the body would not be likely to be found. There would, in such a case, be a secret disposition of the body, and the jury must say, in each case, whether or not the facts shew that there has been such a disposition. In this case there was abundant evidence to go to the jury that the body had been disposed of secretly. The evidence of a secret disposition consisted in the situation in which the body was placed, and it was a question for the jury to say whether placing the body in such a situation was, in fact, a secret disposition of the body. It is easy to suggest cases where placing a body in a particular situation would undoubtedly be evidence of a secret disposition, as if a body were thrown down from a cliff to the sea-shore, in a secluded place. If, however, the place were very much frequented, there might be no evidence of a secret disposition from such an act. There must, no doubt, be an intent to conceal the body, but here there is no question as to the intent. The second question is as to the direction of the learned judge. I think it was right.

1870

THE QUEEN
v.
BROWN.

BYLES, J. I am of the same opinion. I doubt, however, whether we have any power to question the ruling of the learned judge.

WILLES and HANNEN, JJ., and CLEASBY, B., concurred.

Conviction affirmed.

Attorneys for prosecution: *Shum & Crossman, for Daglish & Stewart, Newcastle.*

END OF EASTER TERM, 1870.

CASES

DETERMINED BY THE

COURT FOR CROWN CASES RESERVED

IN

TRINITY TERM, XXXIII VICTORIA.

1870

June 4.

THE QUEEN v. BUTTLE.

Evidence—Perjury—Answers to Commissioners for Inquiring into Existence of Corrupt Practices at Elections—26 Vict. c. 29, s. 7—Construction.

By 26 Vict. c. 29, s. 7, it is enacted, that witnesses before commissioners for inquiring into the existence of corrupt practices at elections shall not be excused from answering questions on the ground that the answers thereto may criminate them, and “that no statement made by any person in answer to any question put by such commissioners shall, except in cases of indictments for perjury, be admissible in evidence in any proceeding, civil or criminal”:

Held, that “except in cases of indictments for perjury” applies only to perjury committed before the commissioners, and therefore, on an indictment for perjury committed at the trial of an election petition, evidence of answers to commissioners appointed to inquire into the existence of corrupt practices at the election in question is not admissible.

CASE stated by Kelly, C.B. :—

Indictment for perjury committed at the trial of an election petition, in respect of the borough of Bridgwater, before Blackburn, J. The perjury assigned was, that the prisoner “had not received money for his vote,” and “that he had not received ten pounds for his vote.”

The prisoner was tried at the last assizes for the county of Somerset. Evidence was given on which, though it was by no means conclusive, a conviction might have been obtained. The counsel for the prosecution then proved that, upon a commission to

inquire into the existence of corrupt practices at the election in question before certain commissioners, the prisoner was examined as a witness upon oath, and admitted upon such examination that he had received 10*l*. for his vote at the election in question, and he further admitted in express terms that he had sworn falsely upon the trial of the election petition before Blackburn, J.

1870

THE QUEEN
v.
BUTLER.

It was contended for the prisoner that this evidence was not admissible, and that the exception in relation to perjury in 26 Vict. c. 29, s. 7 (1), applied only to perjury committed before the commissioners under the commission, and not to perjury committed upon the trial of the election petition, the judgment or report upon which petition had led to the commission of inquiry. Inasmuch as it was clear that the prisoner had been compelled, under peril of commitment and imprisonment, to give evidence before the commissioners, and consequently, that the evidence which he so gave, which was perfectly true, was obtained from him by compulsion, if it could be used in evidence against him on a criminal charge, the rule of law that no man is bound to criminate himself would be defeated.

The prisoner was found guilty.

The question was, whether this evidence was admissible.

The case was argued before Kelly, C.B., Martin, B., Blackburn, Mellor, and Montague Smith, JJ.

Saunders, for the prisoner. The question is, whether the words "except in cases of indictments for perjury" include all indictments for perjury, or only indictments for perjury committed before the commissioners. It is contrary to the whole scope and object of the section that the words should have the larger meaning, and

(1) 26 Vict. c. 29, s. 7, enacts, that no witness before commissioners inquiring into the existence of corrupt practices at elections shall be excused from answering questions on the ground that the answer thereto may criminate him, and a witness answering all such questions shall be entitled to receive a certificate, which shall be a defence to him against any proceedings for any

offence, under the Corrupt Practices Prevention Acts, committed by him before so giving his evidence. . . .

"Provided that no statement made by any person in answer to any question put by or before such commissioners shall, except in cases of indictments for perjury, be admissible in evidence in any proceeding, civil or criminal."

1870
 THE QUEEN
 v.
 BUTTLE.

there is nothing unreasonable or contrary to the ordinary rules of construction in reading these words as applying only to perjury before the commissioners. The evidence was, therefore, not admissible.

Pool, for the prosecution. The words "except in cases of indictments for perjury" are general, and subject to no exception, and the evidence was therefore admissible. To construe these words in a limited sense would be contrary to their plain and ordinary meaning. If the legislature had intended to except any class of cases, such exception could easily have been expressed. There is no ambiguity here. The only question is, whether the words of the section are to be read in their ordinary sense. Reference to the earlier statute, 15 & 16 Vict. c. 57, shews that the words include all indictments for perjury. S. 8 of 15 & 16 Vict. c. 57, contained provisions somewhat similar to those of s. 7 of 26 Vict. c. 29, and a somewhat similar proviso, but the exception to the proviso is, "except in cases of indictment for perjury *committed in such answers*." It must be assumed that the legislature intended a change of meaning by this change of words, especially as the alteration of meaning is clear and unambiguous if the words are read in their ordinary sense. [He referred to *Reg. v. Scott*. (1)]

KELLY, C.B. I am of opinion that this conviction should be quashed. The question is, what is the meaning and spirit of the statute (26 Vict. c. 29, s. 7)? It enables the commissioners to summon people before them, and to put to them any questions respecting the elections. The question then is, what are the terms and conditions upon which this power is given to the commissioners? It seems to me that the powers of the commissioners may be thus stated: When a witness is before them they may be supposed to say, "You must answer all proper questions we may choose to put to you; if you refuse to do so, we shall commit you to prison. If you answer truly, you are safe. If by any answer you are exposed to a criminal proceeding for bribery, the Court will stay the proceedings against you. Further, the evidence you shall give shall under no circumstances whatever be used against you. But if you

(1) *Dear. & Bell*, 47; 25 L. J. (M.C.) 128.

do not tell the truth, and by answering untruly you defeat justice and mislead us, you may be indicted for this perjury, and this evidence may then be used against you."

1870
THE QUEEN
v.
BUTLER.

I think that it was not the intention of the legislature that a witness should be compelled to answer, under pain of imprisonment, and should then be exposed to an indictment for some perjury committed on another occasion, and that his answers before the commissioners should be used as evidence at the trial of that indictment. This would be directly subversive of the principle of the common law. If, however, a witness commits perjury before the commissioners, his evidence before the commissioners may be used against him on an indictment for that perjury. In the former statute (15 & 16 Vict. c. 57, s. 8) there are words which, if they had been introduced here, would have put the present question beyond doubt. The witness would then clearly have been protected. The reason why these words were omitted no doubt is that, whoever framed this statute, did so in a slovenly way, and shewed great want of care in drawing it.

MARTIN, B. I am of the same opinion. The proviso in the section (26 Vict. c. 29, s. 7), is that "no statement made by any person in answer to any question put by or before such commissioners shall, except in cases of indictments for perjury, be admissible in evidence in any proceeding, civil or criminal." We are asked to read the section as allowing these statements to be admissible evidence in all indictments for perjury. If this is not the true construction of the section evidence of these statements is not admissible, because then the rule of the common law intervenes which excludes this species of proof. Of course no other kind of evidence is excluded, and the accused person might be convicted on other evidence. I think that these answers were not admissible in evidence unless the witness is deprived of his common law protection. We cannot assume that this protection is taken away unless the legislature clearly says so; and as the statute (26 Vict. c. 29, s. 7) does not clearly say so, I think the protection is not taken away, and the evidence therefore was not admissible.

BLACKBURN, J. I am of the same opinion. Section 7 of 26

1870

THE QUEEN
v.
BUTLER.

Vict. c. 29, enacts :—[the learned Judge read the first part of the section]. By the common law a witness may, but is not compelled to, answer questions if the answers would criminate him. By this section the legislature says that a witness before a commission shall answer questions notwithstanding that the answer may criminate him. Then comes the proviso :—[the learned Judge read the proviso]. The proviso is general, that no statement before the commissioners shall be given in evidence at all, in any proceedings civil or criminal. This provision is for the purpose of obtaining full discovery of all the matters as to which the witness is questioned. Then comes the exception in the proviso, “except in cases of indictments for perjury.” These words, again, are quite general; and Mr. Poole’s argument is, that the evidence was consequently admissible on this and on any other trial for perjury. I think, however, that this is not the true construction. I think that the exception must be correlative with the operation of the statute, and that it therefore refers only to perjury committed under the statute, that is to perjury before the commissioners.

In 15 & 16 Vict. c. 57, s. 8, there are provisions somewhat similar to those of 26 Vict. c. 29, s. 7; and then there follows a proviso to s. 8 of 15 & 16 Vict. c. 57: “Provided always that no statement made by any person in answer to any question put by such commissioners shall, except in cases of indictment for perjury committed in such answers, be admissible in evidence in any proceeding, civil or criminal.” The older section has, however, been remodelled and quite altered in form in the later one, and the words, “committed in such answers,” have been omitted in s. 7 of 26 Vict. c. 29. When the legislature change the words of an enactment, no doubt it must be taken *primâ facie* that there was an intention to change the meaning of the enactment. This, however, is not necessarily so. Here, the omission may have been because there was a wish to change the law, or because the omitted words were thought to be superfluous. I cannot believe that there was a wish to change the law, and I therefore think that the evidence was not admissible.

MELLOR, J. I am of the same opinion. The object of the statute is to enable the commissioners to prosecute their inquiries

successfully. The statute, therefore, protects witnesses who answer truly, and I think that "except in cases of indictment for perjury" means perjury committed before the commissioners.

1870

THE QUEEN

v.
BUTLER.

MONTAGUE SMITH, J. I am of the same opinion. The section protects witnesses answering truly from all liability to proceedings under the Corrupt Practices Prevention Acts, and it also provides that no statement made by such witnesses before the commissioners shall be admissible in evidence in any proceeding, civil or criminal. The intention of the section is shewn by these general words; and I think the exception does not apply to any indictment for perjury except perjury committed before the commissioners.

Conviction quashed.

Attorneys for prosecution : *Torr & Co.*

Attorneys for prisoner : *Reed & Cook, Bridgwater.*

THE QUEEN v. JOSEPH N. HADFIELD.

June 4.

Obstruction of Train—24 & 25 Vict. c. 97, s. 36—Altering Signals.

24 & 25 Vict. c. 97, s. 36, enacts that "whosoever, by any unlawful act, or by any wilful omission or neglect, shall obstruct, or cause to be obstructed, any engine or carriage using any railway, . . . shall be guilty of a misdemeanour."

The prisoner unlawfully altered some railway signals at a railway station. The alteration caused a train, which would have passed the station without slackening speed, to slacken speed, and to come nearly to a stand. Another train going in the same direction, and on the same rails, was due at the station in half an hour:—

Held (Martin, B. dissenting), that the prisoner had "obstructed" a train within the meaning of s. 36 of 24 & 25 Vict. c. 97.

CASE stated by the Deputy Chairman of Quarter Sessions for the county of Chester.

Indictment under 24 & 25 Vict. c. 97, s. 36, that the prisoner "by a certain unlawful act, to wit, by unlawfully interfering with and changing certain signals in use upon a certain railway called, &c., . . . unlawfully and wilfully did obstruct, and cause to be obstructed, a certain engine and carriages then using such railway, against the form," &c.

1870

THE QUEEN
v.
HADFIELD.

Second count: that the prisoner "unlawfully and wilfully did obstruct, and cause to be obstructed, a certain engine and carriages then using a certain railway, called," &c.

The prisoner was tried on the 22nd of February, 1870.

At about eleven o'clock on the night of the 14th of January last, the clerk in charge of the Dukinfield station of the Manchester, Sheffield, &c., Railway, arranged the signals for the night. There was a semaphore signal on the platform, having several arms, with a separate lever to work each arm, and there were two signals at about 200 yards distance from and on either side of the station, one on the "up" line and the other on the "down" line, and both worked by levers from the platform at the station. The clerk put out the lights of the semaphore signal, and placed the arms down to indicate the lines "all clear," and the two distant signals he arranged so as to shew white lights also indicating that the lines were clear. Subsequently the prisoner climbed over a door in the wall of the station and altered the signals. He placed one arm of the semaphore at right angles with the post, and another at an acute angle, the former signifying "danger," the latter "caution." He made both the distant signals shew red lights, indicating "danger." The prisoner was not sober. The clerk gave him into custody for meddling with the signals. On his way back to the station, after giving the prisoner into custody, the clerk saw a goods train which, under ordinary circumstances, would have passed through Dukinfield station without slackening speed, moving slowly through the station on the "up" line.

The driver of the goods train proved that he had observed the distant signal on the "up" line shewing the red light, and that in consequence he shut off steam and approached the Dukinfield station cautiously, and that at the station he brought the train "very near to a stand, and could have come to a stand at any moment," but seeing no one on the platform he passed on. It was also proved that the mail train going in the same direction, and on the same rails as the goods train, was due at Dukinfield station in about half an hour after the goods train so passed through the station.

The jury found the prisoner guilty.

The question was, whether the above facts amounted to an

"obstruction" within the meaning of s. 36 of 24 & 25 Vict. c. 97. (1)

1870

THE QUEEN
v.
HADFIELD.

The case was argued before Kelly, C.B., Martin, B., Blackburn, Mellor, and Montague Smith, JJ.

Horatio Lloyd, for the prosecution. The words of s. 36 (1) are, "obstruct or cause to be obstructed." There is nothing in the section to shew that the obstruction must be some physical obstacle on the line. If a train is unlawfully stopped, it is obstructed whether the stoppage is caused by signals or by placing something on the rails. The wording of s. 35 (1) also shews that there may be an obstruction by the unlawful alteration of signals. In this case the goods train was obstructed because it was stopped, and its stoppage was also an obstruction of the mail train, which was due at the place shortly afterwards.

No counsel appeared for the prisoner.

KELLY, C.B. I think the obstruction in this case is within s. 36 of 24 & 25 Vict. c. 97. The prisoner changed the railway signals from "all clear" to "danger" and "caution." Then a goods train came, which, but for this change, would have passed on through the station without slackening speed. The driver of the train, however, seeing the state of the signals, came "very near to a stand." A mail train was going in the same direction, and on the same rails, and was due at the station in half an hour. I think that there was as much an obstruction as if a log of wood

(1) Section 35 of 24 & 25 Vict. c. 97, enacts that "whosoever shall unlawfully and maliciously put, place, cast, or throw upon or across any railway any wood, stone, or other matter or thing, or shall unlawfully and maliciously take up, remove, or displace any rail, sleeper, or other matter or thing belonging to any railway, or shall unlawfully and maliciously turn, move, or divert any points or other machinery belonging to any railway, or shall unlawfully and maliciously make or shew, hide or remove, any signal or light upon or near to any railway, or shall

unlawfully and maliciously do, or cause to be done, any other matter or thing, with intent in any of the cases aforesaid, to obstruct, upset, overthrow, injure, or destroy any engine, tender, carriage, or truck using such railway, shall be guilty of felony. . ."

Section 36:—"Whosoever, by any unlawful act, or by any wilful omission or neglect, shall obstruct, or cause to be obstructed, any engine or carriage using any railway, or shall aid or assist therein, shall be guilty of a misdemeanour. . ."

1870
THE QUEEN
v.
HADFIELD.

had been placed across the rails. There was a direct obstruction, which I think is within the words as well as the spirit of the section.

MARTIN, B. If the decision of this case rested with me, I should be of opinion that there had been no obstruction within s. 36. I think that it is straining the meaning of the section to hold this to be an obstruction. The words of the section are:—[the learned Judge read the section]. I think that stopping a train by changing the signals is not “to obstruct or cause to be obstructed an engine or carriage” within this section.

BLACKBURN, J. Section 35 of 24 & 25 Vict. c. 97, deals with malicious obstructions to railways. [The learned Judge read the section]. The felony under this section consists not in the wrongful act alone, but in its being done with a malicious intent. Then comes s. 36, which creates a misdemeanour. [He read the section]. Section 36 deals with an offence much less serious than that mentioned in s. 35. The offence, under s. 36, is the unlawfully obstructing a train, not in obstructing it unlawfully with a malicious intent, as required by s. 35. In this case a drunken man unlawfully changed the signals. The natural result of this would be to stop the train, and to cause derangement of the whole machinery of the railway. If this is the natural result of the prisoner's act, is it not a causing a train to be obstructed? There is nothing in s. 36 to shew that the obstruction must be a physical one. It is sufficient if a train is in fact obstructed.

MELLOR, J. Section 35 defines a number of unlawful acts, including the altering of signals, which if done with a malicious intent, are felonies. Section 36 says, if “by any unlawful act” any person shall obstruct an engine, &c., he shall be guilty of a misdemeanour. I think the acts specified in s. 35 are all included in s. 36 under the terms “unlawful act,” and as an actual obstruction was caused in this case by one of the acts mentioned in s. 35, I think the prisoner was guilty of obstructing a train within the meaning of s. 36.

MONTAGUE SMITH, J. I am of the same opinion. The words

of the section are:—[the learned Judge read the section]. I think that s. 36 may be read by reference to s. 35, which assumes that a train may be obstructed by dealing with the signals, and as the train in this case was in fact obstructed, I think the case comes within s. 36, and that the prisoner was rightly convicted.

1870

 THE QUEEN
 v.
 HADFIELD.

Conviction affirmed.

Attorneys for prosecution: *Cunliffe & Beaumont.*

THE QUEEN v. KAY.

 June 4.

Forgery—24 & 25 Vict. c. 98, s. 24—"Warrant," "Authority," "Request," "for the Payment of Money"—*Receipt.*

S. 24 of 24 & 25 Vict. c. 98, enacts that, "whosoever, with intent to defraud, shall make . . . any warrant, order, authority, or request for the payment of money . . . for, in the name, or on the account, of any other person, without lawful authority or excuse, . . . shall be guilty of felony":—

Held, that a document, in form a mere receipt given by a depositor to a building society that received money on deposit, might properly be described in an indictment as a "warrant," "authority," or "request" "for the payment of money," if, by the custom of the society, such receipts were in fact treated as warrants, authorities, and requests for the payment of money; and, therefore, that a person forging such a receipt might be properly convicted under s. 24 of 24 & 25 Vict. c. 98, upon an indictment so describing the document as a "warrant," "authority," or "request" "for the payment of money."

CASE stated by A. R. Adams, Q.C., Commissioner.

Indictment for feloniously making, by procuration, in the name of one Susey Ambler, a security for money, to wit £17l. 13s., without lawful authority or excuse, with intent to defraud. In the second count the prisoner was charged as in the first count, except that it was stated that he made the security without the lawful authority of the said Susey Ambler. The third and fourth counts were as the first and second, except that the document was described as a "warrant." The fifth and sixth counts were as the first and second, but the document was described as an "order." The seventh and eighth counts were also as the first and second, but the document was described as an "authority for the payment of money." The ninth and tenth counts were also as the first and

1870

 THE QUEEN
 v.
 KAY.

second, but the document was described as a "request for the payment of money." In ten other counts the prisoner was charged with feloniously signing by procuration like documents as in the other counts, *mutatis mutandis*.

The prisoner was tried at the last assizes for the West Riding of Yorkshire, at Leeds.

The document forming the subject of the indictment was in the following form :—

"Thornton, October, 1867.

"Received of the South Lancashire Building Society the sum of four hundred and seventeen pounds 13s., on account of my share, No. 8071.

"Pp. Susey Ambler,

"417l. 13s.

"Wm. Kay."

The prisoner was the local agent at Thornton of a society called "The South Lancashire Permanent Building Society," the head office of which was at Manchester. The society carried on a large business, and was in the habit of taking money on deposit for fixed periods at various rates of interest; but, if circumstances were favourable, and the funds of the society flourishing, no objection was made to repay money lent on deposit at a date earlier than that originally agreed on, if the depositor gave one month's notice of an intention to withdraw the whole or a part of a deposit.

Susey Ambler was a depositor in the society, and in August, 1866, she lent to the society, through the prisoner, 460l. for two years, at interest, and received from the prisoner a deposit note for that sum, signed by him as agent. In August, 1868, the prisoner informed Mrs. Ambler that the sum of 41l. 8s. was due to her as interest on her loan of 460l. She, however, told him that he was to pay her the 1l. 8s., and put the balance (40l.) to her loan account; he then promised to do so, and obtained from her the receipt he had given her, and afterwards gave her an accountable receipt for 500l. at interest, signed by him as agent for the society. In October, 1867, the prisoner sent to the secretary of the society, at Manchester, the document on which the indictment was founded, and at the same time forwarded his monthly statement of accounts, in which he debited himself, amongst other sums, with 750l. received from the secretary, and credited himself, amongst other

payments, with a payment to Susey Ambler, 8071, of the sum of 417*l.* 13*s.*

1870

THE QUEEN

v.
KAY.

The secretary of the society absconded in 1868 or 1869; and on examination of the accounts of the society, a large deficit was discovered.

The present secretary, W. Wadsworth, was called as a witness for the prosecution, and he proved that, if a depositor at a fixed date wished to withdraw the whole or any part of his deposit, a notice of one month was required by the society's rules, but he did not know whether or not that rule had not been frequently dispensed with; he proved that it was the custom of the agents to write to the secretary at Manchester each month, sending in an account of the probable withdrawals of money, for which the agent had, or ought to have had, notice, and that the secretary thereupon sent down to the agent sufficient funds for that purpose; he also proved that in the books of the society it appeared that the sum of 417*l.* 13*s.* had been paid in October, 1867, to Susey Ambler, and produced the receipt before mentioned. He stated that he had carefully searched through the documents, but could find no order for the payment of that sum signed by S. Ambler, or any document relating to that payment, except the monthly account and the receipt; nor could he find any letter from the agent giving notice that Susey Ambler required a return of a portion of her deposit. He stated that receipts were required, and that it was the duty of the agents not to pay without receipts, and to forward the receipts to the office, when the sums would be properly entered in the books of the society.

He also proved that the prisoner was a director of the society in the years 1868 and 1869.

It was objected, on the part of the prisoner, that under 24 & 25 Vict. c. 98, s. 24 (1), this indictment must fail, as the document produced was only a receipt for money paid, and as the word "receipt" was not in that section; and that it was clear from the evidence that the money was paid to the prisoner by the secretary

(1) S. 24 of 24 & 25 Vict. c. 98, enacts that, "whosoever, with intent to defraud, shall draw, make, &c., . . . any undertaking, warrant, order, authority,

or request for the payment of money, . . . by procuration or otherwise, without lawful authority or excuse, . . . shall be guilty of felony."

1870
THE QUEEN
v.
KAY.

before the receipt was handed over by him. The Commissioner declined to stop the case, on the authority of *Reg. v. Raake* (1), *Reg. v. Illidge* (2), and *Reg. v. Pulbrook*. (3) The counsel for the prisoner thereupon addressed the jury, contending that there was nothing proved which could justify them in saying that the society had ever treated such documents as anything else than simple receipts for money previously paid. The Commissioner told the jury, that if they were of opinion that the society had recognized such documents as orders, or as authorities, or requests to pay money, they should find the prisoner guilty; and that they might take into their consideration the fact that in this case no order or authority or request from Sussey Ambler, or pretending to be signed by her, had been discovered amongst the papers of the society.

The jury returned a verdict of guilty, saying, that by the custom of the society such documents were treated as "authorities to pay," and as "warrants to pay," and as "requests to pay money," but not as "orders." A verdict of guilty was then directed on the counts wherein the document was described as a "warrant," "authority," or "request."

The question was, whether under the circumstances, the document in question could be held to be a "warrant," or an "authority," or a "request to pay money."

April 30. No counsel appeared.

Our. adv. vult.

June 4. The judgment of the Court (Bovill, C.J., Willes, Byles, and Hannen, JJ., and Cleasby, B.) was delivered by

BOVILL, C.J. We are of opinion that the conviction in this case was right. The jury found that documents such as that in question were, by the custom of the society, treated as "an authority to pay," as a "warrant to pay," and as "a request to pay money." We think there is no objection in law to its being so treated. In *Morrison's Case* (4), it was held that a pawnbroker's

(1) 2 Mood. C. C. 66.

(3) 9 C. & P. 37.

(2) 1 Den. C. C. 404; 18 L. J. (M.C.) 179.

(4) Bell, C. C. 158; 28 L. J. (M.C.) 210.

ticket might be treated as a warrant for the delivery of the goods. 1870
 In *Allen v. The Sea, &c., Assurance Co.* (1), it was held that a
 credit note, signed by the directors and addressed to the cashier of
 a company, might be declared upon as a promissory note of the
 company; and we think that the document in this case might
 properly be described as a "warrant," an "authority," or "a re-
 quest," to pay money, and that the conviction must be affirmed.

THE QUEEN
 v.
 KAY.

Conviction affirmed.

THE QUEEN v. KILHAM.

June 4.

False Pretences—24 & 25 Vict. c. 96, s. 88—Temporary use of Chattel.

S. 88 of 24 & 25 Vict. c. 96, enacts that, "whosoever shall, by any false pre-
 tence, obtain from any other person any chattel, money, or valuable security, with
 intent to defraud, shall be guilty of a misdemeanour . . ." :-

Held, that "obtain" does not mean obtain the loan of, but obtain the property
 in, any chattel, &c., and that to constitute an obtaining by false pretences, it is
 essential that there should be an intention to deprive the owner wholly of the
 property in the chattel, and, consequently, that obtaining by false pretences the
 use of a chattel for a limited time only, without an intention to deprive the owner
 wholly of the chattel, is not an obtaining by false pretences within s. 88 of 24 &
 25 Vict. c. 96.

CASE stated by the Recorder of York.

Indictment under 24 & 25 Vict. c. 96, s. 88, for obtaining goods
 by false pretences.

The prisoner was tried at the last Easter quarter sessions for
 York. The prisoner, on the 19th of March last, called at the livery
 stables of Messrs. Thackray, who let out horses for hire, and stated
 that he was sent by a Mr. Gibson Hartley to order a horse to be
 ready the next morning for the use of a son of Mr. Gibson Hartley,
 who was a customer of the Messrs. Thackray. Accordingly, the
 next morning the prisoner called for the horse, which was delivered
 to him by the ostler. The prisoner was seen, in the course of the
 same day, driving the horse, which he returned to Messrs.
 Thackray's stables in the evening. The hire for the horse, amount-
 ing to 7s., was never paid by the prisoner.

The prisoner was found guilty.

1870

THE QUEEN
v.
KILHAM.

The question was, whether the prisoner could properly be found guilty of obtaining a chattel by false pretences within the meaning of 24 & 25 Vict. c. 96, s. 88. (1)

The case of *Reg. v. Boulton* (2) was relied on on the part of the prosecution.

The case was argued before Bovill, C.J., Willes, Byles, and Hannen, JJ., and Cleasby, B.

May 7. No counsel appeared for the prisoner.

Simpson, for the prosecution. The question is, whether there can be an obtaining goods by false pretences within s. 88, when the taking of the goods under similar circumstances would not be a larceny. If the prisoner in this case had simply taken the horse away without leave, for the purpose of using it during the day, there would have been no larceny, because there would not be any intention to deprive the owner wholly of the property. The point in this case is, whether the same principle applies to the offence of obtaining goods by false pretences. In *Rex v. Crossley* (3) it was held that obtaining a loan of money by false pretences was an offence under s. 53 of 7 & 8 Geo. 4, c. 29, and Patteson, J., said, "as to the money being advanced by the prosecutor only as a loan, the terms of the Act of Parliament embrace every mode of obtaining money by false pretences, by loan as well as by transfer." In *Reg. v. Boulton* (2) it was held that obtaining a railway ticket by false pretences, although with the intention of giving up the ticket at the end of the journey, was an obtaining by false pretences under the same section. The authority of *Reg. v. Boulton* (2) was recognized in the subsequent case of *Reg. v. Morrison*. (4) In 1 Russell on Crimes, however, 4th ed., p. 646, n., the very facts of the present case are put as an hypothetical case, and it is said, "it could hardly be contended that" the horse was obtained by false pretences, and the correctness of the decision in *Reg. v. Boulton* (2) is questioned.

(1) 24 & 25 Vict. c. 96, s. 88, enacts that, "whosoever shall, by any false pretence, obtain from any other person any chattel, money, or valuable security, with intent to defraud, shall be guilty of a misdemeanour."

(2) 1 Den. C. C. 508; 19 L. J. (M.C.) 67.

(3) 2 Moo. & Rob. 17, 19.

(4) Bell, C. C. 158; 28 L. J. (M.C.) 210.

[He also referred to Burn's Justice, vol. iii. p. 198, 30th ed.; 2 East, P. C. 689; 33 Hen. 8, c. 1; 30 Geo. 2, c. 24.]

1870

THE QUEEN
v.
KILHAM.

Cur. adv. vult.

June 4. The judgment of the Court (Bovill, C.J., Willes, Byles, and Hannen, JJ., and Cleasby, B.) was delivered by

BOVILL, C.J. We are of opinion that the conviction in this case cannot be supported. The statute 24 & 25 Vict. c. 96, s. 88, enacts that, "whosoever shall, by any false pretence, obtain from any other person any chattel, money, or valuable security, with intent to defraud, shall be guilty of misdemeanour." The word "obtain" in this section does not mean obtain the loan of, but obtain the property in, any chattel, &c. This is, to some extent, indicated by the proviso, that if it be proved that the person indicted obtained the property in such manner as to amount in law to larceny, he shall not, by reason thereof, be entitled to be acquitted; but, it is made more clear by referring to the earlier statute from which the language of s. 88 is adopted. 7 & 8 Geo. 4, c. 29, s. 53, recites that "a failure of justice frequently arises from the subtle distinction between 'larceny and fraud,'" and, for remedy thereof, enacts that "if any person shall, by any false pretence, obtain," &c. The subtle distinction which the statute was intended to remedy was this: that if a person, by fraud, induced another to part with the possession only of goods and converted them to his own use, this was larceny; while, if he induced another by fraud to part with the property in the goods as well as the possession, this was not larceny. (1)

But to constitute an obtaining by false pretences it is equally essential, as in larceny, that there shall be an intention to deprive the owner wholly of his property, and this intention did not exist in the case before us. In support of the conviction the case of *Reg. v. Boulton* (2) was referred to. There the prisoner was indicted for obtaining, by false pretences, a railway ticket with intent to defraud the company. It was held that the prisoner was rightly convicted, though the ticket had to be given up at the end of the

(1) See the cases on this subject; 2 Russ. on Crimes, 200, 4th ed., and 67.
(2) 1 Den. C. C. 508; 19 L. J. (M.C.)
note (d) p. 664.

1870
THE QUEEN
v.
KILHAM.

journey. The reasons for this decision do not very clearly appear, but it may be distinguished from the present case in this respect: that the prisoner, by using the ticket for the purpose of travelling on the railway, entirely converted it to his own use for the only purpose for which it was capable of being applied. In this case the prisoner never intended to deprive the prosecutor of the horse or the property in it, or to appropriate it to himself, but only intended to obtain the use of the horse for a limited time. The conviction must, therefore, be quashed.

Conviction quashed.

Attorney for prosecution: *Dale, York.*

June 4.

THE QUEEN v. SVEN SEBERG.

Evidence—Jurisdiction—Ship and Shipping—Ownership of Vessel—Registration—Merchant Shipping Act, 1854 (17 & 18 Vict. c. 104), s. 106.

On a trial for maliciously wounding on the high seas, it was stated by three witnesses that the vessel was a British ship of Shields, and that she was sailing under the British flag, but no proof was given of the register of the vessel or of the ownership:—

Held, that the Court had jurisdiction over the offence; first, because the evidence was sufficient to prove that the vessel was a British vessel; secondly, because even if it had appeared that the vessel was not registered, the Court would still have jurisdiction, as there is nothing in the Merchant Shipping Acts to take away that jurisdiction, and also, by reason of s. 106 of the Merchant Shipping Act, 1854, which provides that, as regards the punishment of offences committed on board such a ship, she shall be dealt with in the same manner as if she were a recognized British ship.

CASE stated by Hannen, J:—

Indictment charging the prisoner with maliciously wounding one W. Bedlington with intent to do him grievous bodily harm.

The prisoner was tried at the last spring assizes for Cornwall.

The prisoner was a sailor on board the bark *Statesman*, and while on the high seas on a voyage from Alexandria to Falmouth he inflicted on W. Bedlington, the mate of the vessel, a dangerous wound with a knife.

The master, the boatswain, and one of the crew of the *Statesman*, stated that the vessel was a British ship of Shields, and that

she was sailing under the British flag, but no proof of the register of the vessel, or of the ownership, was given.

It was objected on behalf of the prisoner that this evidence was not sufficient to establish that the ship was a British ship, and that without proof of the ship having been registered as a British ship the prisoner could not be convicted.

This was the question for the consideration of the Court.

The jury found the prisoner guilty.

May 7. No counsel appeared.

Cur. adv. vult.

June 4. The judgment of the Court (Bovill, C.J., Willes, Byles, and Hannen, JJ., and Cleasby, B.) was delivered by

BOVILL, C.J. We think the conviction in this case was correct. The evidence was, in our opinion, sufficient to prove that the vessel was a British ship without proof of her having been registered; and even if it had appeared that she had not been registered, we think the prisoner ought to have been convicted: first, because there is nothing in the Merchant Shipping Acts to take away the criminal jurisdiction of the Court; and, next, by reason of the provision at the end of s. 106 of the Merchant Shipping Act, 1854 (17 & 18 Vict. c. 104) (1), which provides that, as regards the punishment of offences committed on board such a ship, she shall be dealt with in the same manner as if she was a recognized British ship. The conviction will, therefore, be affirmed.

Conviction affirmed. (2)

(1) 17 & 18 Vict. c. 104, s. 106, enacts that, "whenever it is declared by this Act that a ship belonging to any person . . . qualified according to this Act to be owner of British ships, shall not be recognized as a British ship, such ship shall not be entitled to any benefits, privileges, advantages, or protection usually enjoyed by British ships, and shall not be entitled to use the British flag or assume the British

national character; but so far as regards the payment of dues, the liability to pains and penalties, and the punishment of offences committed on board such ship, or by any persons belonging to her, such ship shall be dealt with in the same manner in all respects as if she were a British ship."

(2) See *Leary v. Lloyd*, 3 E. & E. 178; 29 L. J. (M.C.) 194.

1870

THE QUEEN
v.
SEBERG.

1870

June 4.

THE QUEEN v. JESSE SMITH.

*Receiving Stolen Goods—Larceny by Partner—24 & 25 Vict. c. 96, s. 91—
31 & 32 Vict. c. 116, s. 1—Construction.*

24 & 25 Vict. c. 96, s. 91, enacts that, "whosoever shall receive any chattel, . . . the stealing or taking . . . whereof shall amount to a felony, either at common law or by virtue of this Act, knowing the same to have been feloniously stolen or taken, . . . shall be guilty of felony."

31 & 32 Vict. c. 116, s. 1, enacts that, "if any person, being a member of any co-partnership . . . shall steal or embezzle any money or goods . . . of or belonging to such co-partnership, . . . every such person shall be liable to be dealt with, tried, convicted, and punished for the same, as if such person had not been or was not a member of such co-partnership" :—

Held, that it is not an offence, under s. 91 of 24 & 25 Vict. c. 96, to receive stolen goods, knowing them to have been stolen, if the stealing is not a crime either at common law or under 24 & 25 Vict. c. 96, although the stealing is a felony under 31 & 32 Vict. c. 116, s. 1.

CASE stated by A. R. Adams, Q.C., Commissioner.

Indictment under s. 91 of 24 & 25 Vict. c. 96, for receiving goods, the property of G. Morton and another, knowing them to have been feloniously stolen.

The prisoner was tried at the last assizes for the West Riding of Yorkshire, at Leeds.

G. Morton was in partnership with one R. F. Martin, at Leeds, and they carried on business in that town as ironmongers, under the firm of "R. F. Martin & Co." The goods sold there were principally supplied by W. Morton, of Birmingham, trading under the firm of Haines and Morton. In consequence of certain rumours as to the solvency of his firm, G. Morton came to Leeds on the 13th of December, 1869, and made arrangements with his partner, R. F. Martin, to secure the debt due to Haines & Morton by giving a bill of sale of the goods then in the shop; and whilst this document was being prepared G. Morton left Leeds and went to Sheffield. During his absence his partner, R. F. Martin, had interviews with the prisoner, and before the return of G. Morton, on the 14th of December, shut up the shop, and in the evening of the following day he hired drays, and in the presence of the prisoner conveyed the whole of the goods to the house of the prisoner, who apparently paid 100*l.* for them to R. F. Martin;

the goods were proved to be worth considerably more than 300*l*. The prisoner was aware of the intended bill of sale, and that R. F. Martin was disposing of these goods in fraud of his partner, and to prevent the operation of the bill of sale.

1870
THE QUEEN
v.
SMITH.

It was objected, on the part of the prisoner, that even if it were proved that R. F. Martin had committed an act of felony against his partner under 31 & 32 Vict. c. 116, s. 1 (1), and that he had been guilty of larceny of the partnership goods, yet that the prisoner could not be indicted for receiving such goods, knowing them to be stolen, as that statute had not made such receiving a felony, and that under 24 & 25 Vict. c. 96, s. 91 (2), only persons who received goods, the stealing of which amounted to felony either at common law or under the provisions of that Act, could be indicted as receivers; and as the stealing by a partner was not a larceny at common law, or under the provisions of 24 & 25 Vict. c. 96, no receiver of such goods could be indicted for a felony.

The jury found the prisoner guilty of receiving the goods, knowing them to be stolen.

The question was, whether the prisoner had been properly convicted.

The case was argued before Bovill, C.J., Willes, Byles, and Hannen, JJ., and Cleasby, B.

April 30. *Waddy (Wilberforce* with him), for the prisoner. The conviction should be quashed, first, because Martin was not guilty of a felony; secondly, because even if he was guilty of a felony,

(1) 31 & 32 Vict. c. 116, s. 1, enacts that, "if any person, being a member of any co-partnership, or being one of two or more beneficial owners of any money, goods, or effects, bills, notes, securities, or other property, shall steal or embezzle any such money, goods, or effects, bills, notes, securities, or other property of or belonging to any such co-partnership, or to such joint beneficial owners, every such person shall be liable to be dealt with, tried, convicted, and punished for the same, as if such person had not been or was not a member of

such co-partnership, or one of such beneficial owners."

(2) 24 & 25 Vict. c. 96, s. 91:—
"Whoever shall receive any chattel, money, valuable security, or other property whatsoever, the stealing, taking, extorting, obtaining, embezzling, or otherwise disposing whereof shall amount to a felony, either at common law or by virtue of this Act, knowing the same to have been feloniously stolen, taken, extorted, obtained, embezzled, or disposed of, shall be guilty of felony..."

1870
THE QUEEN
v.
SMITH.

the receipt of the goods by the prisoner is not an offence under s. 91 of 24 & 25 Vict. c. 96. Martin's offence is only criminal by 31 & 32 Vict. c. 116, s. 1. This section renders him liable to be dealt with as a felon, but does not make him a felon. The goods, therefore, were not feloniously stolen, and the prisoner was wrongly convicted. Secondly, even if Martin did feloniously steal the goods, still the prisoner cannot be convicted under s. 91 of 24 & 25 Vict. c. 96, because that section only applies to the receipt of goods, the stealing of which amounts to a felony "either at common law or by virtue of this Act." The fraudulent taking of partnership goods by one of two partners is not a crime either at common law or by 24 & 25 Vict. c. 96, and therefore the case does not come within s. 91. No question can at present arise as to the prisoner's liability as an accessory, because he is not indicted as such.

[He referred to Dwarris on Statutes, 634-5, and *Rees v. Handy*. (1)]

Campbell Foster, for the prosecution. 24 & 25 Vict. c. 96, s. 91, extends to the case of goods stolen by a partner. 31 & 32 Vict. c. 116, does not create any new offence, it only alters a technical rule respecting the effect of the joint ownership of property. The stealing of goods is a felony at common law, but one of several joint owners of goods taking the goods could not be convicted of this felony. 31 & 32 Vict. c. 116, abolishes this rule as to joint ownership; and a joint owner is now in the same position in this respect as a mere stranger, and may be convicted of stealing goods in which he has a joint property. The offence of which he may be thus convicted is not a new one created by the statute, but an old common law offence, and therefore within the meaning of s. 91 of 24 & 25 Vict. c. 96.

Cur. adv. vult.

June 4. The judgment of the Court (Bovill, C.J., Willes, Byles, and Hannen, JJ., and Cleasby, B.) was delivered by

BOVILL, C.J. The prisoner was convicted for feloniously receiving stolen goods, knowing them to have been stolen, *contra formam statuti*. There was no count charging the prisoner as accessory either before or after the fact. The statement of facts shews

evidence of a receipt of goods stolen by one partner of the firm, with knowledge of their being stolen. It further states facts which might, perhaps, have been relied on to sustain a charge of being a simple accessory to the felony if the indictment had contained a count to that effect. We must, however, deal with the only question raised, viz., whether the conviction upon the special charge of feloniously receiving stolen goods can be sustained.

Section 91 of 24 & 25 Vict. c. 96, creates the felony charged in these terms: "Whosoever shall receive any chattel, &c., the stealing, &c., whereof shall amount to a felony *either at common law or by virtue of this Act*, knowing the same to have been feloniously stolen, &c., shall be guilty of felony, and may be indicted and convicted either as an accessory after the fact or for a substantive felony, and shall be liable, at the discretion of the Court, to a maximum sentence of fourteen years penal servitude." At the time that Act (24 & 25 Vict. c. 96) was passed theft by a partner of the goods of the firm did not fall within the criminal law, either common or statute. This defect was supplied by 31 & 32 Vict. c. 116, which, after reciting that "it is expedient to provide for the better security of the property of co-partnerships and other joint beneficial owners against offences by part owners thereof, and further to amend the law as to embezzlement," proceeds to enact, by the first section, that if a partner, or one of two or more beneficial owners, shall steal, &c., any property of such co-partnership or such joint beneficial owners, "every such person shall be liable to be dealt with, tried, convicted, and punished for the same as if such person had not been or was not a member of such co-partnership, or one of such beneficial owners." This enactment is, therefore, limited in words to the fraudulent partner, and does not directly extend to third persons who deal with the property, though in collusion with such partner. In order to reach such persons either the law as to accessories must be resorted to, or it must be shewn that 24 & 25 Vict. c. 96, s. 91, is extended by implication to, and is to be read as incorporated in, 31 & 32 Vict. c. 116.

As to the law of accessories we do not suggest any doubt that if a statute creates a felony or misdemeanour, it by implication forbids counselling, aiding, or abetting the offence. This is now provided for in language strongly contrasting with that of 24 &

1870

THE QUEEN

v.
SMITH.

1870

THE QUEEN
v.
SMITH.

25 Vict. c. 96, s. 91, as to felony by 24 & 25 Vict. c. 94, s. 1, that "whosoever shall become an accessory before the fact to any felony, whether the same be a felony at common law or by virtue of any Act passed *or to be passed*, may be indicted, tried, convicted, and punished in all respects as if he were a principal felon." The case of accessories after the fact is provided for in like prospective terms by s. 3. Also as to misdemeanours by s. 8: "whosoever shall aid, abet, counsel, or procure the commission of any misdemeanour, whether the same be a misdemeanour at common law, or by any Act passed *or to be passed*, shall be liable to be tried as a principal offender." And apart from these enactments, the common law would have supplied a remedy, though without the statutory facilities of procedure. As already pointed out, however, the conviction of the prisoner is not as of a simple accessory, whether before or after the fact; and it cannot be sustained upon that footing. The question, therefore, depends upon whether 24 & 25 Vict. c. 96, s. 91, is extended by inference or implication to the present case; if not, the conviction was wrong, because at the common law receivers of stolen goods, unless they likewise received and harboured the thief, were guilty of a bare misdemeanour, for which they were liable to fine and imprisonment; Foster's Crown Law, p. 373; and there could not be a conviction for a misdemeanour upon the present indictment for felony.

The subject of extending statutes by inference, to include cases not originally contemplated, is one which has given rise to several decisions, the leading characteristic of which is, that the earlier statute deals with a genus within which a new species is brought by a subsequent Act. Thus, choses in action were not originally within 13 Eliz. c. 5, against fraudulent conveyance, that statute being applicable only to property which could be taken in execution: *Sims v. Thomas* (1); but as to choses in action made subject to execution by 1 & 2 Vict. c. 110, there can be no doubt that by the conjoint operation of that Act and the 13 Eliz. c. 5, such choses in action having become, by new enactment, a species of the genus property subject to execution, did, without any express enactment to that effect in the later statute, become subject to the

(1) 12 A. & E. 536.

operation of the former Act: *Norcutt v. Dodd* (1); *Barrack v. McCulloch*. (2) So that, if 24 & 25 Vict. c. 96, s. 91, is to be read as a general enactment, that for the future any person receiving goods stolen with a guilty knowledge that they were stolen, should be liable to be indicted for felony as a receiver, the subsequent statute having introduced a new species of larceny, it might have been contended that the general provision as to receiving in the former statute was by inference extended to the new species of larceny.

There are, however, several difficulties in the way, upon the construction of 24 & 25 Vict. c. 96, of arriving at that result: first, the express words of s. 91, "either at common law or by virtue of this Act;" secondly, the fact that the statute, in *pari materia*, as to accessories, does expressly refer to Acts to be passed; thirdly, the character of the extending enactment, 31 & 32 Vict. c. 116, which deals not so much with property or acts of a particular species, as with a class of persons whom it specifies, and against whom only it is in terms directed, viz., partners and part owners, so that the effect is to create a new class of offenders; fourthly, the rule peculiarly applicable to the elaborate criminal legislation of which the statute under consideration forms a part, against extending penal enactments by construction. This latter rule may be illustrated by reference to the statute 31 Eliz. c. 12, s. 5, which took away clergy from an accessory in horse stealing, upon which it was held that the enactment extended only to such persons as were in judgment of law accessories at the time the Act was made, viz., accessories at common law, and not to such as are made accessories by subsequent statutes; and, therefore, a person knowingly receiving a stolen horse, though made an accessory by subsequent statutes, was held not to be ousted of clergy by the statute of Elizabeth: *Foster's Crown Law*, p. 372. Upon these grounds we think the statute 24 & 25 Vict. c. 96, s. 91, cannot be extended by construction, so as to include a receiver of property stolen by a partner, so as to make such receiver liable in the discretion of the Court to the graver punishment of fourteen years penal servitude thereby imposed, as the prisoner would be if

1870

 THE QUEEN
v.
SMITH.

(1) Cr. & Phill. 100.

(2) 3 K. & J. 110; 26 L. J. (Ch.) 105.

1870
THE QUEEN
v.
SMITH.

this conviction were sustained—a circumstance which makes the authority cited from Foster especially applicable. The conviction must, therefore, be quashed.

Conviction quashed.

Attorneys for prosecution: *Williamson, Hill, & Co., for Bond & Barwick, Leeds.*

Attorney for prisoner: *A. Billington, Leeds.*

June 11.

THE QUEEN v. JOHN DAVIS.

Evidence—Onus of Proof—Receiving Stolen Goods—Previous Convictions—Habitual Criminals Act (32 & 33 Vict. c. 99), s. 11—Construction.

32 & 33 Vict. c. 99, s. 11, enacts, that when any person who has been previously convicted of certain specified offences “is found in possession of stolen goods, evidence of such previous conviction shall be admissible as evidence of his knowledge that such goods have been stolen;” and in proceedings against such person as receiver of stolen goods, proof may be given of his previous conviction, “provided that not less than seven days’ notice shall be given to such person that proof is intended to be given of his previous conviction, and that he will be deemed to have known such goods to have been stolen until he has proved the contrary”:—

Held, on an indictment for receiving stolen goods, that service of a notice under this section and proof of a previous conviction does not relieve the prosecution from the necessity of proving that the prisoner knew that the goods had been stolen.

CASE stated by H. S. Giffard, Q.C., Commissioner.

Indictment for receiving stolen goods, knowing them to be stolen.

The prisoner was tried at the last spring assizes for Glamorgan-shire.

At the trial a notice under s. 11 of 32 & 33 Vict. c. 99 (1), was

(1) 32 & 33 Vict. c. 99, s. 11, enacts that, “where any person, who either before or after the passing of this Act, has been previously convicted of any offence specified in the first schedule hereto” [which includes larceny], . . . “is found in the possession of stolen goods, evidence of such previous conviction shall be admissible as evidence

of his knowledge that such goods have been stolen; and in any proceedings that may be taken against him as receiver of stolen goods, or otherwise in relation to his having been found in possession of such goods, proof may be given of his previous conviction before evidence is given of his having been found in possession of such stolen goods;

proved to have been duly served upon the prisoner, and also that in the year 1867 the prisoner had been convicted of larceny, and that he had received the goods which were the subject of the indictment, and that those goods were stolen.

1870
THE QUEEN
v.
DAVIS.

The jury were told that the legislature must be taken to have intended that the notice should have the operation which, upon the face of it, it purported to have, and that the prisoner ought to be deemed to have known such goods to have been stolen until he proved the contrary.

The jury found the prisoner guilty.

The question was, whether the direction to the jury was right.

June 4. No counsel appeared.

June 11. THE COURT (Kelly, C.B., Martin, B., Blackburn, Mellor, and Montague Smith, JJ.) held that the conviction must be quashed.

Conviction quashed.

provided that not less than seven days' notice shall be given to such person that proof is intended to be given of his previous conviction, and that he will be

deemed to have known such goods to have been stolen until he has proved the contrary. . ."

END OF TRINITY TERM, 1870.

CASES

DETERMINED BY THE

COURT FOR CROWN CASES RESERVED

IN

MICHAELMAS TERM, XXXIV VICTORIA.

1870
Nov. 12.

THE QUEEN *v.* JAMES Warburton.

*Conspiracy—Agreement to Commit Civil Wrong—Fraud on Partner in taking
Accounts on Dissolution of Partnership.*

A fraudulent agreement by a member of a partnership with third persons, wrongfully to deprive his partner by false entries and by false documents of all interest in some of the partnership property on taking accounts for the division of the property on the dissolution of the partnership, is a conspiracy, although the offence was completed before the passing of 31 & 32 Vict. c. 116, by which a partner can be criminally convicted for feloniously stealing partnership property.

CASE stated by Brett, J. :—

Indictment, amongst other counts, that the prisoner had unlawfully conspired with one Joseph Warburton, and one W. H. Pepys, by divers subtle means and devices to cheat and defraud the prosecutor, S. C. Lister.

At the trial at the summer assizes, in 1870, for the West Riding of Yorkshire, at Leeds, it was found that the prisoner and Lister were in 1864 in partnership, and carried on a part of the partnership business at Urbigau, in Saxony, by there selling patent machines, that the prisoner had given notice according to the terms of the partnership agreement for a dissolution of the partnership between himself and Lister; and that upon such dissolution an account was to be taken according to the partnership agreement of the partnership property, and that according to it such property would be divided on such dissolution in certain proportions between

the prisoner and Lister after payment of partnership liabilities; and that the prisoner, in order to cheat Lister, had agreed with his brother Joseph Warburton, who managed the partnership business at Urbigan, and with Pepys, who resided at Cologne, to make it appear by documents, purporting to have passed between Pepys and Joseph Warburton, and by entries in the partnership books or accounts, made under the superintendence of Joseph Warburton, that Pepys was a creditor of the firm for moneys advanced; and that, by reason of such documents and entries, certain partnership property was to be withdrawn and to be handed to Pepys or otherwise abstracted or kept back so as to be divided between the prisoner and Joseph Warburton and Pepys, to the exclusion of Lister from any interest or advantage in or from or in respect of it.

1870
THE QUEEN
v.
WARBURTON.

The jury, upon this evidence, found the prisoner guilty of the conspiracy charged, and rightly so found if in point of law such an agreement made by a partner with such an intent to defraud his partner of partnership property and to exclude him entirely from any interest in or advantage from it on such an occasion, that is to say, on the taking of an account for the purpose of dividing the partnership property on a dissolution of the partnership, by means of false entries in the partnership books, and false documents purporting to have passed with a supposed creditor of the firm, is a conspiracy for which a prisoner can be criminally convicted.

The offence, if it were one, was fully completed before the passing of 31 & 32 Vict. c. 116, by which a partner can be criminally convicted for feloniously stealing partnership property.

The question for the opinion of the Court was whether the verdict could be sustained so as to support a conviction for conspiracy in point of law.

Waddy (Whitaker with him) for the prisoner. To constitute a conspiracy there must be an agreement to do an illegal act or to do a legal act by illegal means. (1) Here the acts agreed upon, although doubtless immoral, are not illegal. If the agreement had been carried out, the prisoner could not have been sued at law by Lister, nor could he have been indicted for doing the agreed

(1) See Russell on Crimes, 4th ed. vol. iii. p. 116.

1870
THE QUEEN
v.
WARBURTON.

acts: Lindley on Partnership, 2nd ed. vol. ii. p. 856. It is not an indictable offence for one partner to obtain some of the partnership money from the other partners by means of a fraudulent misstatement of existing facts: *Reg. v. Evans*. (1) The acts contemplated by the agreement were, therefore, neither actionable nor criminal.

[COCKBURN, C.J. Even assuming that no action or indictment would lie for such acts, the acts are wrongful nevertheless, and there is a remedy, viz., by proceedings in equity.]

An act which merely gives a right to proceed in equity is not an illegal act within the meaning of the definitions of conspiracy.

Maule, Q.C. (*Nathan* with him), for the prosecution, was not called upon.

COCKBURN, C.J. It has been doubted sometimes whether the law of England does not go too far in treating as conspiracies agreements to do acts which, if done, would not be criminal offences. This question does not, however, arise here, as no one would wish to restrict the law so that it should not include a case like the present. It is sufficient to constitute a conspiracy if two or more persons combine by fraud and false pretences to injure another. (2) It is not necessary in order to constitute a conspiracy that the acts agreed to be done should be acts which if done would be criminal. It is enough if the acts agreed to be done, although not criminal, are wrongful, i.e., amount to a civil wrong. Here, there was undoubtedly an agreement with reference to the division of the partnership property or of the partnership profits. It is equally clear that the agreement was to commit a civil wrong, because the agreement was to deprive the prisoner's partner by fraud and false pretences of his just share of the property or profits of the partnership. A civil wrong was therefore intended to Lister. The facts of this case thus fall within the rule that when two fraudulently combine, the agreement may be criminal, although if the agreement were carried out no crime would be committed, but a civil wrong only would be inflicted on a third party. In this case the object of the agreement was, perhaps, not criminal. It is not necessary to decide whether or not it was criminal; it

(1) Leigh & Cave, 252; 32 L. J. (M.C.) 38.

(2) See Russell on Crimes, 4th ed. vol. iii. p. 116.

was, however, a conspiracy, as the object was to commit a civil wrong by fraud and false pretences, and I think that the conviction should be affirmed.

1870

THE QUEEN
v.
WARBURTON.

CHANNELL and CLEASBY, BB., KEATING and BRETT, JJ., concurred.

Conviction affirmed.

Attorneys for prosecution: *Wilson, Bristows & Garpmael.*

Attorneys for prisoner: *Pitman & Lane, for Ferns, Leeds.*

END OF MICHAELMAS TERM, 1870.

CASES
DETERMINED BY THE
COURT FOR CROWN CASES RESERVED
IN
HILARY TERM, XXXIV VICTORIA.

1871
Jan. 21.

THE QUEEN v. HARDY.

Obstruction of Train—24 & 25 Vict. c. 97, s. 36—Making Signals.

24 & 25 Vict. c. 97, s. 36, enacts that, "whosoever by any unlawful act, or by any wilful omission or neglect, shall obstruct, or cause to be obstructed, any engine or carriage using any railway . . . shall be guilty of a misdemeanour."

The prisoner, who was not a servant of the railway company, stood on a railway between the two lines of rails, at a point between two stations. As a train was approaching he held up his arms in the mode used by inspectors of the line when desirous of stopping a train between two stations. This, as the prisoner intended that it should, caused the driver to shut off steam and diminish the speed, and led to a delay of four minutes:—

Held, that the prisoner had obstructed a train within the meaning of 24 & 25 Vict. c. 97, s. 36.

CASE stated by Keating, J.

Indictment under 24 & 25 Vict. c. 97, s. 36, that the prisoner "by a certain unlawful act, to wit, by unlawfully interfering with and changing, and by making and shewing certain signals upon a certain railway to wit, &c., unlawfully and wilfully did obstruct, and cause to be obstructed, an engine and carriages then using the said railway against the statute, &c."

Second count, that the prisoner did "unlawfully and wilfully obstruct and cause to be obstructed an engine and carriages then using the said railway against the statute, &c."

The prisoner was tried on the 26th of July, 1870.

At 10 A.M. on the 24th of May, 1870, the defendant requested

the signal man at the Luton Station, on the Midland Railway, to stop the goods train then coming towards it, on its way to Leagrave, two and a half miles nearer to Bedford, to which latter place he was anxious to proceed in order to catch a passenger train. The signal man refused to do so, and referred him to the station-master, who also gave a like refusal. The defendant then proceeded along the line towards Leagrave 700 or 800 yards and on the goods train approaching him, having passed the Luton Station, he placed himself on the space between the two lines of railway, and held up his arms in the mode used by inspectors of the line when desirous of stopping a train between two stations. The defendant knew that his doing so would probably induce the driver to stop or slacken speed, and his intention was to produce that effect. The driver, supposing him to be an inspector, shut off steam, diminishing the speed gradually from twenty to four miles an hour, and the defendant, when the train came up at that speed, jumped into the guard's van, and the train, without actually stopping, proceeded onward towards Leagrave at its usual pace. The delay caused by shutting off the steam and diminishing the speed was about four minutes, and the station-master stated that if the goods train had not on that occasion been before its usual time, the delay of four minutes would have obliged him to stop the next passenger train if punctual to its time. No actual delay in that respect, however, took place. The defendant was a season ticket holder, but had no right as such to travel in a goods train.

The jury found the prisoner guilty.

The question was whether the facts as stated amounted to an obstruction within the meaning of s. 36 of 24 & 25 Vict. c. 97.(1)

(1) S. 35 of 24 & 25 Vict. c. 97, enacts that "whosoever shall unlawfully and maliciously put, place, cast, or throw upon or across any railway any wood, stone, or other matter or thing, or shall unlawfully and maliciously take up, remove, or displace any rail, sleeper, or other matter or thing belonging to any railway, or shall unlawfully and maliciously turn, move, or divert any points or other machinery belonging to any railway,

or shall unlawfully and maliciously make or shew, hide or remove any signal or light upon or near to any railway, or shall unlawfully and maliciously do or cause to be done any other matter or thing, with intent, in any of the cases aforesaid, to obstruct, upset, overthrow, injure, or destroy any engine, tender, carriage, or truck using such railway, shall be guilty of felony. . . ."

S. 36: "Whosoever by any unlaw-

1871

THE QUEEN
v.
HARDY.

1871
THE QUEEN
v.
HARDY.

The case was argued before Bovill, C.J., Willes and Hannen, JJ., Channell and Pigott, BB.

No counsel appeared for the prisoner.

C. G. Merewether, for the prosecution. This Court has decided in *Reg. v. Hadfield* (1), that an obstruction under s. 36 of 24 & 25 Vict. c. 97, need not be an actual physical obstruction; and therefore in that case it was held that the prisoner who had stopped a train by altering the signals at a station from "all clear" to "danger," and "caution," was rightly convicted of an obstruction under this section. This section, which makes it a misdemeanour to obstruct a train, uses only the general words "by any unlawful act." But s. 35, which makes a similar obstruction felony, if done maliciously, mentions a number of specific acts. And these are all included under the words "unlawful act" in s. 36; *Reg. v. Hadfield*. (1) Then s. 35 uses the words expressly, "make or shew, hide or remove any signal or light." The only distinction between this case and *Reg. v. Hadfield* (1) is that there the prisoner altered a fixed signal, here he made a signal with his arms. But this is making a signal within the meaning of the Act. It is a signal according to the popular use of language. And the case shews that it is the mode of signalling in ordinary use between two stations, as the fixed signal is used at stations.

BOVILL, C.J. There can be no doubt in this case that the prisoner did in fact make a signal, namely, by holding up his arms in the mode used by inspectors of the line when desirous of stopping a train between two stations; or that he did thus obstruct the train, for the driver shut off steam and diminished the speed of the train from twenty to four miles an hour; or that the prisoner did what he did with the intention of producing this result. We have to consider whether this is such an obstruction as is contemplated by s. 36 of 24 & 25 Vict. c. 97.

The first question is whether the section applies to anything except a mere physical obstruction. If it had spoken of obstructing

ful act, or by any wilful omission or neglect, shall obstruct, or cause to be obstructed, any engine or carriage using any railway, or shall aid or assist

therein, shall be guilty of a misdemeanour. . . ."

(1) Ante, p. 253.

the line of railway, it might have been limited to physical obstructions. But the words are "obstruct any engine or carriage." And further the section speaks not only of obstruction "by any unlawful act," but also of obstruction "by any wilful omission or default." These latter words are probably directed to the case of a servant of the company delaying a train by wilfully omitting some act which it is his duty to do; and they must include something beyond mere physical obstruction. But all doubt is removed when we refer to s. 35. That section makes it felony to do certain acts maliciously and with intent to obstruct. It enumerates first a number of acts which would no doubt amount to a physical obstruction of the line itself, such as placing wood or stones across the railway, displacing the rails, or altering the points. Then follow the words "shall unlawfully and maliciously make or shew, hide or remove any signal or light upon or near to any railway;" and then the general words "shall unlawfully and maliciously do or cause to be done any other matter or thing with intent, &c." Now it is quite clear that the making or altering of a signal need not necessarily create any physical obstruction; and it is therefore clear that the word obstruct in s. 35 is not limited to physical obstruction. I should have said the same of s. 36, even if it had stood alone. But plainly the same word must have the same meaning in both sections; and therefore s. 36 applies to other than physical obstructions.

Secondly, I think that each of the things specifically mentioned in s. 35 is included under the general words "any unlawful act" in s. 36. And as the prisoner's act is within the terms of s. 35, he was properly convicted.

The case of *Reg. v. Hadfield* (1) proceeded upon the same principle. It is true that in that case an actual fixed signal was altered; but the Act says expressly "shall make any signal," and the cases are therefore not distinguishable.

WILLES and HANNEN, JJ., CHANNELL and PIGOTT, BB., concurred.

Conviction affirmed.

Attorneys for prosecution: *Beale, Marigold, & Beale.*

(1) Ante, p. 253.

1871
THE QUEEN
v.
HARDY.

1871

Jan. 21.

THE QUEEN v. SAMUEL HARRIS AND HENRY COCKS.

Nuisance—Indecently exposing the Person—Public place—Urinal.

The prisoners were convicted of indecently exposing their persons in a urinal, open to the public, which stood on a public footpath in Hyde Park, and the entrance to which was from the footpath:—

Held, that the jury might well find the urinal to be a public place, and that, therefore, the conviction was good.

Reg. v. Orchard (3 Cox Crim. C. 248), observed upon.

CASE stated by the Assistant Judge of the Middlesex Sessions.

Indictment for a nuisance by indecently exposing the person and committing acts of lewdness in an open and public place.

The prisoners were tried on the 23rd of November, 1870.

It was proved that, complaints having been made to the police of practices at a urinal, two police constables in plain clothes were directed to watch the place, and on the 10th of October they found the two prisoners in the urinal. They were standing facing each other; but on seeing the officers, each retired into a compartment in the urinal. The police officers went to the further end of the urinal where there were openings enabling them to see into the urinal; they then saw Harris leave the compartment which he had previously entered and go to the compartment in which Cocks was. Cocks turned round, and the prisoners exposed their persons and committed acts of lewdness.

The urinal is open to the public, and is situate in Hyde Park near to a lodge the window of which on a first floor commands a view of the urinal, the distance between the lodge and the urinal being 14 feet 6 inches.

The urinal is approached by a gate opening from the public footpath, and there is also access to it by another gate communicating with a small garden belonging to the lodge.

The jury found the prisoners guilty.

The question was whether, in point of law, the conviction could be sustained.

The case was argued before Bovill, C.J., Willes and Hannen, JJ., Channell and Pigott, BB.

H. Giffard, Q.C. (Ribton with him), for the prisoners. The conviction cannot be sustained. To make the acts of the prisoners a criminal offence, they must have been done in an open and public place. It is not every place to which the public have the right of access that is an open and public place in this sense, but the place must be open to public view; otherwise bathing on the most unfrequented spot of the sea-shore would be an offence. And *Reg. v. Orchard* (1) expressly decides that inasmuch as the very purposes for which a urinal is set apart necessarily involve some exposure of the person, it cannot be a public place in such a sense as to make an indecent exposure of the person there a nuisance. On the authority, therefore, of that case, there was no evidence in the present case to go to the jury. In *Sir Charles Sedley's Case* (2), the defendant exposed his person so as to be visible from a public market, and all the other cases in which a conviction has been upheld are upon the same principle.

Harris, for the prosecution, was not called upon.

BOVILL, C.J. If all the facts in *Reg. v. Orchard* (1) had been set out, and the view of the learned judge clearly stated in the report of the case, it might have been some authority for our guidance. But, upon any view of it, I do not think that it applies to the present case.

The indictment is for exposing the person and committing acts of lewdness in an open and public place. If the judge was bound to tell the jury that a urinal could not be such a place, of course the conviction was wrong and must be set aside, but not otherwise. Now, it appears that the urinal was open to the public; that it was in Hyde Park, upon a public footpath; and that the entrance to it was from that footpath. I think it was just as much a public place, with respect to that portion of the public who use it, as a public highway. Every place must be more or less screened from view on some side, and the size of an inclosure does not necessarily affect the question whether it is a public place or not. We are only bound to decide whether this could be a public place. But I think it clearly was so; and just the sort of public place to which the law ought to be applied.

(1) 3 Cox Crim. C. 248.

(2) 1 Sid. 168.

1871

THE QUEEN
v.
HARRIS.

1871
 THE QUEEN v. HARVEY.
 WILLES and HANNEN, JJ., CHANNELL and PIGOTT, BB., con-
 curred.
Conviction affirmed.

Attorneys for prosecution : *Allen & Sons.*

Attorney for prisoner : *Edward Lewis.*

Jan. 21.

THE QUEEN v. HARVEY.

*Coining—Having possession of Coining Tools—Lawful Authority or Excuse—
 24 & 25 Vict. c. 99, s. 24—Felony—Guilty Intent.*

24 & 25 Vict. c. 99, s. 24, enacts that "whosoever without lawful authority or excuse (the proof whereof shall lie on the party accused), shall knowingly make or mend, or begin or proceed to make or mend, or buy or sell, or have in his custody or possession," any die impressed with the resemblance of either side of any current coin, shall be guilty of felony.

Indictment under this section that the prisoner "knowingly and without lawful excuse feloniously" had in his possession dies impressed with the resemblance of the sides of a sovereign.

The prisoner ordered dies, impressed with the resemblance of the sides of a sovereign, of the maker. The maker gave information to the police, who communicated with the authorities of the Mint. The latter authorities, through the police, gave the maker permission to give them to the prisoner. He did so, and they were found in the prisoner's possession :—

Held, first, that it was necessary in the indictment to negative lawful authority or excuse, notwithstanding that the burden of proof lay upon the accused: secondly, that the word "excuse" includes "authority," and therefore the indictment was good: thirdly, that there was no evidence to go to the jury of lawful authority or excuse: fourthly, that the prisoner being knowingly in possession of the dies, had a sufficient guilty knowledge to constitute felony, whatever his intention as to their use might be.

CASE stated by Bramwell, B.

Indictment under 24 & 25 Vict. c. 99, s. 24, that the prisoner "knowingly and without lawful excuse feloniously" had in his custody and possession a die impressed with the resemblance of the obverse side of a sovereign.

Second count: for having possession of a die for the reverse side of a sovereign.

The prisoner was tried at the last Winter Commission for Warwick.

It was proved that the prisoner ordered of a die-sinker two dies having an apparent resemblance to the two sides of a sovereign ; that they were made for him and paid for by him ; that he received them from the maker ; and that when taken into custody they were found on him.

1871

THE QUEEN
v.
HARVEY.

Besides other evidence, the following was given :—

The maker of the dies said, that on the order being given he communicated with the police, with a police-officer named Glossop. On cross-examination he said, "Two days after the prisoner came I told the police. They said they would inform the people in London. Glossop told me to go on. I obtained permission of Manson (another police-officer) or Glossop to give them to the prisoner. I should not have given them up without that permission."

A police-officer deposed : "Glossop was spoken to first, and spoke to me. I communicated with Gem. He is an attorney, and conducts this case. I have received communications from Gem. Gem told me he had communicated with the Mint in London. Bartram had his orders from Glossop. I gave Bartram permission to give the dies to the prisoner. This was in consequence of orders from London."

It was contended that the judge ought to rule, or leave to the jury to say that this constituted lawful cause or excuse. It was also contended that the prisoner ought not to be convicted unless he had a guilty mind, and that if he had no guilty intention in reference to the possession and use of the dies (as to which there was evidence both ways) he was not guilty, and that this ought to be left to the jury.

It was further contended that the indictment was bad, on the ground that it did not negative lawful authority as well as lawful excuse.

The judge refused to direct an acquittal, or to leave to the jury any other questions than whether the dies were found on the prisoner, and whether they had an apparent resemblance to the two sides of a sovereign.

The jury found the prisoner guilty.

The question was, whether the judge ought to have ruled that the prisoner had, or left it to the jury to say if the prisoner had,

1871
THE QUEEN
v.
HARVEY.

lawful authority or excuse, or ought to have left to the jury the question of whether he had a guilty intention in reference to the possession or use of these dies; and whether the indictment was bad.

The case was argued before Bovill, C.J., Willes and Hannen, JJ., Channell and Pigott, BB.

Dugdale, for the prisoner. The indictment is bad. The offence consists in having possession of coining tools "without lawful authority or excuse." (1) And the indictment negatives only excuse. An indictment must negative all the exceptions contained in the same section which creates the offence, per Bailey, J.; *Steel v. Smith*. (2) The earlier enactment, s. 10 of 2 Wm. 4, c. 34, spoke of the two offences separately which in the present section are treated together. It made it felony to make without authority, or to have possession without excuse. But now both authority and excuse apply to each offence, and the words cannot be without meaning.

[PIGOTT, B. Can you suggest an authority which would not be an excuse?

WILLES, J. Excuse is either an authority or a reasonable belief in authority.]

The indictment must in every case follow the statute. In *Lembro v. Hamper* (3), an indictment for perjury was held bad because it omitted the word *voluntarie*. In *Rae v. Davis* (4), under the Black Act, which made it felony "wilfully and maliciously" to shoot at any person, an indictment which used the words "unlawfully, maliciously, and feloniously" was held bad. Under

(1) 24 & 25 Vict. c. 99, s. 24, enacts that, "whosoever without lawful authority or excuse (the proof whereof shall lie on the party accused), shall knowingly make or mend, or begin or proceed to make or mend, or buy or sell, or have in his custody or possession, any puncheon, counter puncheon, matrix, stamp, die, pattern, or mould, in or upon which there shall be made or impressed, or which will make or impress, or which shall be adapted and intended

to make or impress, the figure, stamp, or apparent resemblance of both or either of the sides of any of the Queen's current gold or silver coin, or of any coin of any foreign prince, state, or country, or of any part or parts of both or either of such sides, shall in England and Ireland be guilty of felony. . . ."

(2) 1 B. & A. 94, 99.

(3) Cro. Eliz. 147.

(4) 1 Leach, C. C. 493.

a statute which used the words "wilfully and maliciously," the words "feloniously, voluntarily, and maliciously," in the indictment, were held insufficient in *Rex v. Turner* (1); and under a statute which used the words "unlawfully and maliciously," the words "feloniously, wilfully, and maliciously," in *Rex v. Ryan*. (2)

1871
THE QUEEN
v.
HARVEY.

Secondly, the evidence shews that the authorities of the Mint authorized the maker of the dies to deliver them to the prisoner; he therefore had possession of them by lawful authority. *Reg. v. Bannen* (3), which will be cited on the other side, is no authority on the point. That was an indictment for making a die; the prisoner employed a die sinker to make the die; the maker communicated with the authorities of the Mint, and under their directions made the die for the purpose of detecting the prisoner. The question was whether the prisoner could be convicted as a principal; and it was held that, having acted through an innocent agent, he could. The question did not and could not arise whether he had lawful authority or excuse to possess.

Thirdly, there cannot be a felony without a guilty mind, and as the case states that on this point there was evidence both ways, the question ought to have been left to the jury. The word "feloniously" is necessary in an indictment for felony: *Hawkins P. C.*, Bk. 2, c. 25, s. 55; *Reg. v. Gray*. (4) And, this being so, the word must have a meaning. Felony must be "felleo animo perpetratum:" *Co. Litt.* 391 a.; *Jacob's Law Dict. sub. voc.* In *Reg. v. Sleep* (5) *Cockburn, C.J.*, says, "To constitute an offence there must be a guilty mind."

J. C. Carter, for the prosecution. The indictment is good. It is true that the words "without lawful authority or excuse" occur in the same section which creates the offence. But as the burden of proof is expressly thrown on the accused, they are rather of the nature of a proviso than an exception. The only reason why a proviso need not be negatived is because the proof lies on the accused. But, even if it be otherwise, the word excuse includes authority.

(1) 1 Moo. C. C. 239.

L. J. (M.C.) 78.

(2) 2 Moo. C. C. 15.

(5) *Leigh & Cave*, C. C. 44, 54; 30

(3) 2 Moo. C. C. 309.

L. J. (M.C.) 170, 173.

(4) *Leigh & Cave*, C. C. 365; 33

1871
THE QUEEN
v.
HARVEY.

Equivalent words are always sufficient. In *Grevil's Case* (1) the words of a statute were "shall command, hire or counsel;" and the indictment, which charged that the accused "excitavit, movit, et procurabat," was held good. In *Elsworth's Case* (2) the words of the statute were, "shall falsely make, forge, or counterfeit," and the indictment, which charged the prisoner with "falsely making, forging, and adding, &c.," was held good.

Secondly, the prisoner had no lawful authority or excuse for his possession of the dies. *Reg. v. Bannen* (3) is an authority to this effect. There, as here, the innocent agent was authorized to do what he did, and there was as much an authority to the accused to make in that case as to possess in this.

Thirdly, the intention of the prisoner as to the use of the die is no ingredient in the offence: *Bell's Case*. (4)

BOVILL, C.J. The first question is as to the sufficiency of the indictment. To make an indictment good under the section in question, it must sufficiently describe that which is made an offence by the section; and that is, not simply having possession of coining tools, but having them "without lawful authority or excuse." It is true there are words throwing upon the accused the burden of shewing lawful authority or excuse; but these words only alter the rules of evidence, they do not alter the rule as to the description of the offence in an indictment.

It being necessary, then, to negative "lawful authority or excuse," the words of the present indictment are, "without lawful excuse," nothing being said of authority. If the word "excuse" necessarily includes authority, the indictment will be good; if not, it will be bad. Under the older Act, 2 Will. 4, c. 34, s. 10, two distinct offences were mentioned separately, namely, making or mending coining tools without lawful authority, and having possession of them without lawful excuse. In the present Act the two offences are spoken of together, and the words "without lawful authority or excuse" applied to the whole. This is sufficient to account for the introduction of both words without supposing that in the case of possession both are necessary; and we have been

(1) 1 And. 194.

(2) 2 East, P. C. 986.

(3) 2 Moo. C. C. 309.

(4) Foster's C. L. 430.

unable to conceive any case in which there could be a lawful authority, which was not also a lawful excuse. We must therefore hold that the word "excuse" includes authority, and the indictment is sufficient.

187

THE QUEEN
v.
HARVEY.

The second question is, whether there was any evidence to go to the jury of lawful authority or excuse. The only evidence was that the maker of the dies had permission from the authorities of the Mint to deliver them to the prisoner. In this they only allowed the prisoner to carry out his original intention, whatever that might be; they gave him no authority to have the dies in his possession. I think, therefore, there was no evidence to go to the jury of lawful authority or excuse.

It was further argued that a guilty mind or guilty intention was necessary to the offence; and that the judge ought to have left a question as to intent to the jury. But there is nothing in the Act to make the intent any part of the offence. I agree that under the word "feloniously" a guilty knowledge must be shewn; that is to say, that the accused must have knowingly done that which is made an offence by the Act. What it was here suggested ought to have been left to the jury was the prisoner's intention as to the use of the dies. And that has nothing to do with the offence.

WILLES and HANNEN, JJ., CHANNELL and PIGOTT, BB., concurred.

Conviction affirmed.

Attorney for prosecution : *The Solicitor to the Treasury.*

Attorney for prisoner : *J. M. Green, for E. Parry, Birmingham.*

1871

THE QUEEN v. HENRY DUNNING.

Jan. 21.

Perjury—Indictment—Substance of the Offence charged—Averment of Jurisdiction—23 Geo. 2, c. 11, s. 1—14 & 15 Vict. c. 100, s. 20.

An indictment for perjury stated the offence to have been committed on the trial of "a certain indictment for misdemeanour" at the quarter sessions for the county of Salop; but it did not state what the misdemeanour was, nor that the quarter sessions had jurisdiction to try it:—

Held, that the indictment was good.

CASE stated by Pigott, B.

Indictment for perjury, that "heretofore, to wit, at the general quarter sessions of the peace of our sovereign lady the Queen, holden for the county of Salop, on the 28th day of June, A.D. 1870, at the shirehall in Shrewsbury, in the said county, before Sir Baldwin Leighton, Bart., Sir William Curtis, Bart., and others their associates, her Majesty's justices of the peace, assigned to keep the peace in the county aforesaid, and also to hear and determine divers felonies, trespasses, and other misdemeanours in the same county done and committed, a certain indictment for misdeameanour, in which John Davies of the Bull's Head, Lawley Bank, in the said county, was the prosecutor, and Isaac Rowlands and John Davies were the defendants, came on to be tried in due form of law, and was then and there tried by a jury of the county in that behalf, duly sworn between the parties aforesaid, upon which said trial Henry Dunning appeared as a witness for and on behalf of the said J. R. and J. D., the defendants in the indictment aforesaid, and was then duly sworn and took his corporal oath upon the Holy Gospel of God before the said Sir B. L., Bart., Sir W. C., Bart., and others their associates, so being such justices as aforesaid, that the evidence which he the said H. D. should give to the Court there and the said jury so sworn as aforesaid touching the matter then in question between the prosecutor in the said indictment and the defendants therein should be the truth, the whole truth, and nothing but the truth." Then followed averments of materiality, that the said Henry Dunning, falsely, &c., deposed and swore, &c. Whereas, &c. (here followed the negatives and the formal conclusion that Henry Dunning so committed perjury.)

The prisoner was tried at the last assizes for the county of Salop. It was proved that the indictment on the trial of which the perjury was committed was for an offence against the person under s. 20 of 24 & 25 Vict. c. 100.

1871

THE QUEEN
v.
DUNNING.

At the conclusion of the case for the prosecution it was objected by counsel for the prisoner that the indictment was bad in not stating what the misdemeanour was, or that it was one triable at quarter sessions.

The prisoner was found guilty.

The question was, whether the indictment was good.

Nov. 12. The case was argued before Kelly, C.B., Channell and Cleasby, BB., Keating and Brett, JJ.

Evelyn Ashley, for the prisoner. The indictment is bad, for it does not shew that the quarter sessions had jurisdiction to try the misdemeanour, on the trial of which the perjury is alleged to have been committed. It neither states what the misdemeanour was, so as to enable the Court to see as matter of law that there was jurisdiction; nor does it aver jurisdiction. It is true that by 23 Geo. 2, c. 11, s. 1 (1), and 14 & 15 Vict. c. 100, s. 20 (2), merely formal averments are unnecessary, and that jurisdiction

(1) 23 Geo. 2, c. 11, s. 1, enacts that, "In every information or indictment to be prosecuted against any person for wilful and corrupt perjury, it shall be sufficient to set forth the substance of the offence charged upon the defendant, and by what Court, or before whom the oath was taken [aver- ring such Court, or person or persons, to have a competent authority to ad- minister the same], together with the proper averment or averments to falsify the matter or matters wherein the per- jury or perjuries is or are assigned; without setting forth the bill, answer, information, indictment, declaration, or any part of any record or proceeding, either in law or equity, other than as aforesaid; and without setting forth the commission or authority of the Court, or person or persons before

whom the perjury was committed; any law, usage or custom, to the contrary notwithstanding."

(2) 14 & 15 Vict. c. 100, s. 20, enacts that, "In every indictment for perjury, or for unlawfully, wilfully, falsely, fraudulently, deceitfully, mali- ciously, or corruptly taking, making, signing, or subscribing any oath, affir- mation, declaration, affidavit, deposi- tion, bill, answer, notice, certificate, or other writing, it shall be sufficient to set forth the substance of the offence charged upon the defendant, and by what Court or before whom the oath, affirmation, declaration, affidavit, de- position, bill, answer, notice, certificate, or other writing, was taken, made, signed, or subscribed, without setting forth the bill, answer, information, in- dictment, declaration, or any part of

1871
THE QUEEN
v.
DUNNING.

need not be averred in express terms. But the substance of the offence charged must be set forth, and it goes to the substance of the offence that the Court should have authority to administer the oath taken; the indictment must therefore shew this in substance: *Stedman's Case* (1); *Rex v. Callanan* (2); *Rex v. Dowlin* (3); *Lavey v. The Queen* (4); *Reg. v. Fellowes*. (5) The same principle has been applied with respect to materiality: *Rex v. Dowlin* (3), *Reg. v. Harding* (6); and as to other offences besides perjury: *Reg. v. Philpotts*. (7) The statement that the indictment came on to be tried "in due course of law" is not sufficient to shew jurisdiction: *Reg. v. Overton*. (8)

No counsel appeared for the prosecution.

Cur. adv. vult.

Jan. 21. The judgment of the Court, prepared by Brett, J., was delivered by

CHANNELL, B. In this case the prisoner was tried and convicted at the last summer assizes held at Shrewsbury before Pigott, B., for perjury, committed on the trial at the general quarter sessions of the peace for the county of Salop, of an indictment for misdemeanour against Isaac Rowlands and John Davies, for an offence against the person of John Davies, under s. 20 of 24 & 25 Vict. c. 100. The case at the trial was fully proved in every necessary particular; but it was objected on behalf of the prisoner, and has been argued before us, that the indictment was bad in form, and that the judgment should therefore be arrested, and the conviction quashed. The objection taken at the trial was, that the indictment did not state what the misdemeanour was which was alleged to have been tried at the quarter sessions, or aver that it was one triable at quarter sessions, that is, in other words, did not aver that the court of quarter sessions had jurisdiction to try the misdemeanour. This objection, when developed in argument before

any proceeding, either in law or in equity, and without setting forth the commission or authority of the Court or person before whom such offence was committed."

- (1) Cro. Eliz. 137.
- (2) 6 B. & C. 102.

- (3) 5 T. R. 311.
- (4) 17 Q. B. 496.
- (5) 1 C. & K. 115.
- (6) 8 Cox, Crim. C. 99.
- (7) 1 C. & K. 112.
- (8) 4 Q. B. 83.

us, seemed to fall into two objections; first, that the indictment did not set forth the substance of the offence charged upon the defendant; and, secondly, that it did not expressly aver or shew by necessary inference that the Court before which the false oath was taken had a competent authority to administer the same.

As to the first objection, the indictment alleges that at the general quarter sessions "a certain indictment for misdemeanour" came on to be tried in due form of law, in which one Davies was prosecutor and Bowlands and Davies were defendants, and was then and there tried by a jury, &c., and that the prisoner appeared as a witness upon the said trial, and was then duly sworn, &c. The indictment then sets out the matter sworn to by the prisoner, avers its materiality, and negatives its truth and truthfulness. The objection taken is that it does not state the subject-matter of the indictment for misdemeanour which was tried at the sessions. But that seems rather to point out an alleged defect in not stating the substance of the offence charged against the defendants who were tried at the sessions, than a defect in not stating the substance of the offence charged against the defendant tried at the assizes. The substance of the offence charged against him is that in a judicial proceeding he swore to the truth of certain facts which are set forth, which at the time of so swearing he knew to be false. "All that it is necessary to state," says Buller, J., in *Rex v. Doulin* (1), "is that there was a *certain cause*, &c., and that it came on to be tried in due form of law," &c. It is true, as pointed out by the counsel for the defendant, that in that case it was alleged that one Kimber was tried upon a certain indictment for *murder*, &c., but it seems to us that neither Lord Kenyon nor Buller, J., relies upon the presence of the words "for murder," in stating the proposition of law, but they mention them only in their relation of the actual facts of the case. In the case of *Rex v. Callanan* (2) all that was stated was the substance of what the defendant swore, and that he did so upon affidavit before a commissioner. The indictment did not state the cause for or in respect of which the affidavit was made. Yet Abbott, C.J., says that it sets forth the substance of the matter sworn, using that expression as equivalent to the substance of the offence charged

1871

THE QUEEN
v.
DUNNING.

(1) 5 T. R. 311, at p. 320.

(2) 6 B. & C. 102.

1871
 THE QUEEN
 v.
 DUNNING.

upon the defendant, and holding the case to be consequently within the statute 23 Geo. 2, c. 11. In *Lavey v. The Queen* (1) the objection taken was that it was not shewn that the county court had jurisdiction over the suit in which the alleged false oath was taken, because the nature of the suit was not sufficiently described. "It was argued," says Parke, B., in the judgment, "that in setting forth the substance of the offence it was not sufficient to state the substance of the matter sworn to, and aver that it was false, and to allege the authority of the judge to administer the oath." But the indictment was nevertheless held to be sufficient on the ground that it appeared that there was a judicial proceeding, and that the defendant was sworn, and stated certain matters which were false, and that the judge had power to administer the oath. The ground of decision is that the substance of the offence charged upon the defendant sufficiently appeared, and that the Court had competent authority to administer the oath. These cases seem to us to be authority for the correctness of the suggestion we have made as to the meaning and construction of the statute, and for holding that in the present case the substance of the offence charged against the defendant sufficiently appears.

As to the second point, if the case had depended upon the Statute 23 Geo. 2, c. 14, we should have probably thought that the indictment was insufficient. That statute was passed in order to obviate difficulties in the form of indictments for perjury. It states what it shall be sufficient to set forth, namely, the substance of the offence charged upon the defendant, and by what Court or before whom the oath was taken, "*averring [it says] such Court or person or persons to have a competent authority to administer the same,*" with the proper averment or averments to falsify the matter charged, &c., without setting forth, &c. After that statute the question treated by the Courts in every case was whether an indictment contained the averments mentioned in the statute or their equivalents. If it did it was good without more. But then by Statute 14 & 15 Vic. c. 100, passed to relax still further technical forms of indictments, it is enacted in s. 20 that "in every indictment for perjury, &c., it shall be sufficient to set forth

(1) 17 Q. B. 496.

the substance of the offence charged upon the defendant, and by what court, or before whom the oath was taken, &c., without setting forth, &c." It is almost identical in terms with s. 1 of the 23 Geo. 2 c. 11, except that it omits the words "*averring such Court or person or persons to have a competent authority to administer the same.*" This omission seems to us conclusively to shew the intention of the legislature, that this allegation, or its equivalent, in the indictment, is a technical strictness which may well be dispensed with, the matter of it being left for proof at the trial.

Having then determined that the substance of the offence charged against the defendant is in the present indictment sufficiently stated, we are of opinion that the indictment contains every averment required by s. 20 of 14 & 15 Vic. c. 100, and is therefore by the express terms of the section sufficient, although it does not contain any express or equivalent averment that the Court had competent authority to administer the oath. We are, therefore, finally of opinion that the indictment was sufficient, and that the conviction in this case was right, and must be affirmed.

Conviction affirmed.

Attorney for prisoner: *A. D. Smith, for Walker, Wellington, Salop.*

THE QUEEN v. EDWIN COOKE.

Jan. 28.

Larceny—Obtaining Money by False Pretences—Master and Servant—Misappropriation of Money by Servant.

A servant, whose duty it was to pay his master's workmen, and for this purpose to obtain the necessary money from his master's cashier, fraudulently represented to the cashier that the wages due to one of the workmen were larger than they really were, and so obtained from him a larger sum than was in fact necessary to pay the workmen. He did this intending at the time to appropriate the balance to his own use. Out of the sum so received he paid the workmen the wages really due to them, and appropriated the balance to his own use:—

Held, that whether the obtaining of the money in the first instance was larceny or obtaining money by false pretences, the money while it remained in the prisoner's custody was the property and in the possession of the master, and therefore the misappropriation of it by the servant was larceny.

CASE stated by the Chairman of the Worcestershire Quarter Sessions.

1871

THE QUEEN
v.
COOKE.

Indictment for larceny.

The prisoner was tried on the 2nd of January, 1871, for stealing certain moneys belonging to his master, one George Hands.

The said George Hands was a currier, at Kidderminster, and in the habit of employing several workmen in his said business. The prisoner was in and before the month of November, 1870, and continued until the early part of the following month to be, a servant of the said George Hands, being employed at a weekly salary, as a confidential foreman over the workmen. It was part of the duty of the prisoner to engage and dismiss the workmen, as occasion required, and he generally, but not invariably, consulted his master as to such engagement and dismissal, and as to the amount of wages at which such workmen were to be engaged. The workmen were engaged at so much a week for ordinary time, and they were to be paid after the same proportionate rate for any overtime. A wages book was kept at the master's counting-house, and was given out to the prisoner on the morning of every Saturday (which was the pay-day for the workmen), in order that he might enter on a pay-sheet in the book the names of the several workmen who had been employed during the week, and set opposite to each person's name the amount due to him for wages. When this was done, the prisoner, according to the usual practice, brought back the book to the counting-house and gave it to the master's cashier, who generally shewed it to the master. The several sums entered in the pay-sheet were then added up, and the total amount paid by the cashier to the prisoner, whose duty it would be to pay thereout to the several workmen their respective wages. Among the workmen so employed under the prisoner in the month of November, 1870, was a man named Williams, who had been engaged by the prisoner at 24s. a week for ordinary time (overtime, if any, to be paid for in addition at the same proportionate rate). During the week ending the 12th of November, 1870, Williams had worked overtime, and the wages due to him for that week, calculated at the rate of 24s. a week, amounted to the sum of 1*l.* 8s. and no more. The prisoner, however, had before this time, fraudulently represented to his master that Williams had been engaged at the rate of 26s. a week, and in the pay-sheet for the week ending the 12th of November, 1870, he

fraudulently set opposite the name of Williams, instead of the sum of 1*l.* 8*s.* the correct amount due to him, the sum of 1*l.* 10*s.* 4*d.*, being in fact the amount that Williams would have been entitled to if he had been engaged at the rate of 26*s.* instead of 24*s.* a week. The total amount of the wages in the pay-sheet for that week, including the sum of 1*l.* 10*s.* 4*d.*, so represented to be due to Williams, was the sum of 21*l.* 18*s.*, and the cashier, in ignorance of the fraud practised by the prisoner, and believing that the pay-sheet was correct, on the same 12th of November, paid to the prisoner, out of his master's moneys, the sum of 21*l.* 18*s.*, in order that he might by means thereof pay the several workmen mentioned in the pay-sheet the wages due to them respectively. And the prisoner was not authorized, either by his master or by the cashier, to apply any part of such moneys for any other purpose. After so obtaining the sum of 21*l.* 18*s.* from the cashier, on the same day the prisoner paid thereout to Williams the sum of 1*l.* 8*s.*, being the correct amount of the wages due to him, and fraudulently appropriated thereout to his own use the sum of 2*s.* 4*d.*, being the excess of the sum represented in the pay-sheet to be due to Williams, over the sum actually due, and the prisoner intended, at the time when he obtained the money from the cashier, to appropriate this excess to his own use, and to defraud his master of the same.

The appropriation of this excess of two shillings and fourpence was the subject of the first count of the indictment, on which the prisoner was tried.

It was objected by the counsel for the prisoner that, even if the above facts were proved, the offence of the prisoner was not a felony, but that of obtaining money by false pretences.

The prisoner was found guilty.

The question was whether the prisoner, on the foregoing state of facts, was properly found guilty of felony.

The case was argued before Bovill, C.J., Willes and Hannen, JJ., Channell and Pigott, BB.

Streeten (*Jelf* with him), for the prisoner. The prisoner was not properly convicted of larceny; his offence was only obtaining money by false pretences. The distinction between the two

1871

THE QUEEN
v.
COOKER.

1871
THE QUEEN
v.
COOKE.

offences is clearly pointed out by Talfourd, J., in *White v. Garden* (1): "There is a very obvious distinction between the cases of goods obtained by felony, and fraud or false pretences. In the one case the owner of the goods has no intention to part with his property; in the other he has." And Parke, B., in *Powell v. Hoyland* (2), says: "If a person, through the fraudulent representations of another, delivers to him a chattel, intending to pass the property in it, the latter cannot be indicted for larceny, but only for obtaining the chattel under false pretences." The law is laid down in similar terms in 2 East. P. C., p. 816; 2 Russell on Crimes, 4th ed. pp. 200, 201; Archbold, Criminal Pleading, 16th ed. p. 312. And this distinction is a material one: per Bovill, C.J., *Reg. v. Prince*. (3) In the present case the cashier, who was the prosecutor's agent for this purpose, parted with the property. The test is, whether there was any intention to retain a control over the money or that it should come back to the master's hands. And this there was not. *Reg. v. Thompson* (4) is expressly in point. In that case the prisoner was clerk to the prosecutors, and it was his duty to ascertain each day the amount of dock and town dues payable upon their goods during the day, to obtain the amount from the cash-keeper, and to pay it over to the persons entitled. On one occasion he fraudulently represented the amount payable to be larger than it really was, obtained the larger amount from the cash-keeper, and appropriated the difference; and it was held that his offence was obtaining money by false pretences, not larceny. The earlier cases, *Witchell's Case* (5), and *Reg. v. Leonard* (6), are to the same effect. The prisoner having obtained the money, and with an existing fraudulent intent, the misappropriation took place then, and his offence was completed. Nothing that took place afterwards can constitute larceny. There can be no larceny without a trespass; and if there was any trespass here, it could only have been at the time of first obtaining the money. Here, too, as in *Reg. v. Thompson* (4), it would be impossible to specify the money stolen. Therefore a

(1) 10 C. R. 919, at p. 927.

(2) 6 Ex. 67, at p. 70.

(3) Ante, p. 150, 154.

(4) Leigh & Cave, C. C. 233; 32 L. J. (M.C.) 57.

(5) 2 East. P. C. 830.

(6) 1 Den. C. C. 304.

larceny cannot be proved. The statute as to fraudulent misappropriation by bailees (1) has no application to the case. There is no bailment unless the property is to be returned, and to be returned in specie: *Reg. v. Hassall*. (2) A bailment is there expressly defined by Cockburn, C.J., as "a deposit of something to be returned in specie." (3)

1871
THE QUEEN
v.
COOKE.

J. O. Griffiths and *Montague Williams*, for the prosecution, were not called upon.

BOVILL, C.J. The point submitted to us is whether in this case there was any evidence to go to the jury of a larceny. The objection was, that even if the facts, as stated, were proved, the offence of the prisoner was not a felony, but that of obtaining money by false pretences. What, then, are the facts? [His Lordship stated the facts as already set out.] Now, it is expressly stated that the prisoner, after receiving 21*l.* 18*s.* of his master's money, paid *thereout* certain moneys on his master's account, and "fraudulently appropriated *thereout* to his own use the sum of 2*s.* 4*d.*" Thus the whole foundation of one of Mr. Streeten's arguments fails. He says the jury could not find that the particular moneys intrusted, or any particular moneys, were appropriated. The case states otherwise. It steers clear of the difficulties which have arisen in some cases, such as *Reg. v. Thompson* (4), inasmuch as the misapplication is found to have been of a portion of the very moneys delivered to the prisoner.

It was next contended that the manner in which the prisoner obtained the 21*l.* 18*s.* was an obtaining the money by false pretences, but did not amount to larceny. If this had been the only circumstance in the case, the question would have had to be determined, and it would have been a question for the jury.

(1) 24 & 25 Vict. c. 96, s. 3, enacts that, "whosoever, being a bailee of any chattel, money, or valuable security, shall fraudulently take or convert the same to his own use, or the use of any person other than the owner thereof, although he shall not break bulk or otherwise determine the bailment, shall be guilty of larceny, and may be con-

victed thereof upon an indictment for larceny. . . ."

(2) Leigh & Cave, C. C. 58; 30 L. J. (M.C.) 175.

(3) Leigh & Cave, C. C. at p. 63; 30 L. J. (M.C.) at p. 176.

(4) Leigh & Cave, C. C. 233; 32 L. J. (M.C.) 57.

1871

THE QUEEN

v.
COOKER.

But, after the money was handed over, whose property was it? I think the evidence shews it was the master's; and, if so, at common law, the possession was the master's too. A servant and a bailee at common law are in a different position; for a bailee has the possession of the goods intrusted to him, a servant only the custody. A servant could therefore be indicted for stealing the things in his custody, but in his master's possession. Difficulties arose, it is true, in cases where the servant received property from a third person, and appropriated it to his own use before it ever came into the hands of his master or of any fellow-servant for him. And hence the statutes as to embezzlement were passed. But in all other cases the offence was larceny at common law, as in *Reg. v. Watts*. (1) So in this case the money, while in the prisoner's hands, was clearly his master's money at the time of the misappropriation, and it was in the constructive possession of the master. The misappropriation of it was, therefore, larceny.

Even if the prisoner had anything more than the bare custody of the money as a servant, it is difficult to see why he did not hold it as a bailee within the meaning of the section which has been referred to. But this it is unnecessary to decide.

The decision in *Reg. v. Thompson* (2) went entirely upon the question whether there was a larceny in the obtaining of the money in the first instance. The point was not considered whether the subsequent misappropriation was larceny, nor was any question raised as to the Act relating to fraudulent bailees. The present case is not governed by it, but falls within the decision in *Reg. v. Goods* (3), and other similar cases.

WILLES and HANNEN, JJ., CHANNELL and PIGOTT, BB., concurred.

Conviction affirmed.

Attorney for prosecution: *B. Hunt, for Miller Corbet, Kidderminster.*

Attorney for prisoner: *Dimsdale, for H. Saunders, Kidderminster.*

(1) 2 Den. C. C. 14.

(2) Leigh & Cave, C. C. 233; 32 L. J. (M. C.) 57.

(3) Car. & M. 582.

THE QUEEN *v.* JOHN ARDLEY.

1871

Obtaining Money under False Pretences—Misrepresentation of Quality—Specific Fact.

Jan. 31.

The prisoner induced the prosecutor to purchase a chain from him by fraudulently representing that it was 15-carat gold, when, in fact, it was only of a quality a trifle better than 6-carat, knowing at the time that he was falsely representing the quality of the chain as 15-carat gold:—

Held, that the statement that the chain was 15-carat gold, not being mere exaggerated praise, nor relating to a mere matter of opinion, but a statement as to a specific fact within the knowledge of the prisoner, was a sufficient false pretence to sustain an indictment for obtaining money under false pretences.

Reg. v. Bryan (Deara. & B. C. C. 265) distinguished.

CASE stated by the Chairman of Quarter Sessions for the County Palatine of Durham.

Indictment for obtaining 5*l.* and an Albert chain of the value of 7*s.* 6*d.* by false pretences.

The prisoner was tried on the 2nd of January, 1871.

The material facts were as follows:—

The prisoner went into the shop of the prosecutor, who was a watchmaker and jeweller, and stated that he was a draper, and was 5*l.* short of the money required to make up a bill, and asked the prosecutor to buy an Albert chain which he (the prisoner) was then wearing. The prisoner said, "It is 15-carat fine gold, and you will see it stamped on every link. It was made for me, and I paid nine guineas for it. The maker told me it was worth 5*l.* to sell as old gold." The prosecutor bought the chain, relying, as he said, on the prisoner's statement, but also examining the chain, and paid 5*l.* for it, and gave also to the prisoner in part payment a gold Albert chain valued at 7*s.* 6*d.* The prisoner's chain was marked "15 ct." on every link, and in a very short time afterwards he (the prisoner) was apprehended, and then wore another Albert chain of a character similar to that sold to the prosecutor, this also being marked "15 ct." on every link. It was proved that "15 ct." was a Hall-mark used in certain towns in England, and placed on articles made of gold of that quality, and that chains when assayed are generally found to be one grain less than the mark, exceptionally two grains. The chain bought by the

1871
THE QUEEN
v.
ARDLEY.

prosecutor was assayed and found to be of a quality a trifle better than 6-carat gold, and of the value in gold of 2*l.* 2*s.* 9*d.* It was proved that had it been 15-carat gold it would have been worth 5*l.* 10*s.* Adding the charge for what is called "fashion" or "make," and the price of a locket attached, the chain bought by the prosecutor would be sold for 3*l.* 0*s.* 3*d.*, but had it been 15-carat it would have been sold for 9*l.* There were no drapery goods or anything connected with such trade found on the prisoner, but when arrested he had in his possession a licence to sell plate, two watches, two white metal watch-guards, and the chain obtained from the prosecutor.

The chairman was asked by the counsel for the prisoner to stop the case, on the authority of *Reg. v. Bryan* (1), but declined to do so, and left the case to the jury, who found the prisoner guilty, and said they found that the prisoner knew he was falsely representing the quality of the chain as 15-carat gold.

The question was, whether or not the prisoner was rightly convicted of obtaining money under false pretences.

The case was argued before Bovill, C.J., Willes and Byles, JJ., Channell and Pigott, BB.

John Edge, for the prosecution. The contention for the prisoner is, that the representation that the chain was 15-carat gold was a mere representation of quality, and that, on the authority of *Reg. v. Bryan* (1), such a representation cannot be the subject of an indictment. But the representation here was not one merely as to quality; it was as to the species of the article. In *Reg. v. Dundas* (2) blacking of inferior quality was represented to be "Everett's Premier" blacking; and, that being a well-known article of commerce, it was held that the misrepresentation was indictable. The present case is exactly similar; 15-carat gold is a known and specific article. Even if this be not so, *Reg. v. Bryan* (1) is not an authority for any proposition so wide as that a misrepresentation of quality cannot be indictable. In that case the prisoner represented certain plated spoons to be equal to "Elkington's A.," when in fact they were of inferior quality; and it was held that the conviction could not be supported. But the ground was that

(1) Dears. & B. C. C. 265.

(2) 6 Cox Crim. C. 380.

1871

 THE QUEEN
 v.
 ARDLEY.

the representation was not of any specific fact, but mere puffing and statement of matter of opinion: per Erle, J. (1) The distinction between knowledge and opinion is fully pointed out in 2 Russell on Crimes, p. 664-5, 4th ed., editor's note. And wherever there is a misrepresentation of a specific fact within the knowledge of the maker, there is a criminal offence: *Reg. v. Goss* (2); *Reg. v. Woolley*. (3) Thus in *Reg. v. Jessop* (4) the prisoner was convicted for representing a 1*l.* note to be a 5*l.* note. In *Reg. v. Roebuck* (5) the fraud consisted in representing a chain to be of silver when, in fact, it was base metal. In *Reg. v. Stevens* (6) bars of worthless metal were represented to be ingots of silver. In *Reg. v. Abbott* (7) and *Reg. v. Goss* (2) the fraud consisted in shewing false tasters, representing them to have been taken from cheeses which the prisoners were selling, though really taken from other cheeses. In almost all of these cases the representations related to the quality of goods. The fact that the representations were made in the course of a bargain for sale does not make them the less a criminal offence: *Reg. v. Kenrick* (8); *Reg. v. Bryan*, per Crowder, J. (9)

No counsel appeared for the prisoner.

Greenhow, amicus curiæ, referred to *Reg. v. Ridgway*. (10)

BOVILL, C.J. The question which we have to consider in this case is, whether there was evidence to go to the jury on which they could find the prisoner guilty of obtaining money under false pretences. I think there clearly was evidence; and that it would have been quite impossible for the learned chairman with any propriety to stop the case. There were, in addition to the representations as to the quality of the gold, distinct statements of matters of fact, and there was evidence of the falsehood of these statements. The prisoner stated that he was a draper, and was 5*l.* short of the money required to make up a bill. But there were no drapery goods, nor anything connected with such trade, found on

(1) Dears. & B. C. C. at p. 278.

(6) 1 Cox Crim. C. 83.

(2) Bell C. C. 208; 29 L. J. (M.C.)

(7) 1 Den. C. C. 273.

86.

(8) 5 Q. B. 49.

(3) 1 Den. C. C. 559.

(9) Dears. & B. C. C. 265, at p. 279.

(4) Dears. & B. C. C. 442.

(10) 3 F. & F. 838.

(5) Dears. & B. C. C. 24.

1871
THE QUEEN
v.
ARDLEY.

the prisoner, but when arrested he had in his possession a licence to sell plate, two watches, two white metal watch-guards, and the chain obtained from the prisoner; and he wore another Albert chain of a character similar to that sold to the prosecutor, this also being marked 15-carat gold on every link. Looking, therefore, at the whole of the evidence, there is sufficient ground on which the finding of the jury may be supported and the conviction sustained.

But the jury have further found that the prisoner, when he represented the chain to be 15-carat gold, knew this representation to be false. And the question whether the conviction can be supported upon that finding alone stands upon a somewhat different footing. The cases have drawn nice distinctions between matters of fact and matters of opinion, statements of specific facts and mere exaggerated praise. It is difficult for us, sitting here as a Court, to determine conclusively what is fact and what is opinion, what is a specific statement and what exaggerated praise. These are questions for the jury to decide. And the prisoner has this additional security, that the jury have to consider not only whether the statements made are statements of fact, but also whether they are made with the intention to defraud.

The case which has been most pressed upon us is *Reg. v. Bryan*. (1) The representation in that case was, that certain plated spoons were "equal to Elkington's A." *Primâ facie*, that representation would seem to be a mere matter of opinion, and the Court held that it was not sufficient to support the conviction. But many of the judges expressed the opinion that there might well be cases in which misrepresentations, though as to quality, would be within the statute. Cockburn, C.J., says (2): "If the person had represented these articles as being of Elkington's manufacture, when in point of fact they were not, and he knew it, that would be an entirely different thing." Pollock, C.B., says (3): "I think if a tradesman or a merchant were to concoct an article of merchandise expressly for the purpose of deceit, and were to sell it as and for something very different even in quality from what it was, the statute would apply." It is plain that these learned judges considered that a specific representation of quality,

(1) Dears. & B. C. C. 265.

(2) Dears. & B. C. C. at p. 271.

(3) Dears. & B. C. C. at p. 272.

if known to be false, would be within the statute. Coleridge, J. (1), expressly concurs in the observations of Pollock, C.B. Erle, J., at the close of his judgment (2), says: "No doubt it is difficult to draw the line between the substance of the contract and the praise of an article in respect of a matter of opinion; still it must be done, and the present case appears to me not to support a conviction, upon the ground that there is no affirmation of a definite triable fact in saying the goods were equal to Elkington's A., but the affirmation is of what is mere matter of opinion, and falls within the category of untrue praise in the course of a contract of sale, where the vendor has in substance the article contracted for, namely, plated spoons." Crompton, J. (2), also considered that the statute applies "when the thing sold is of an entirely different description from what it is represented to be." Willes, J., who dissented from the judgment of the Court, goes the whole length of saying that a representation as to quality, if known to be false, is enough to support a conviction. And Bramwell, B., leans to the same opinion.

Applying these observations to the present case, the statement here made is not in form an expression of opinion or mere praise. It is a distinct statement, accompanied by other circumstances, that the chain was 15-carat gold. That statement was untrue, was known to be untrue, and was made with intent to defraud. How does that differ from the case of a man who makes a chain of one material and fraudulently represents it to be of another? Therefore, whether we look at the whole of the evidence, or only at that which goes to the quality of the chain, the conviction is good. The case differs from *Reg. v. Bryan* (3), because here there was a statement as to a specific fact within the actual knowledge of the prisoner, namely, the proportion of pure gold in the chain.

WILLES, J. I am of the same opinion. In *Reg. v. Bryan* (3) Erle, J., and several other judges said that if the prisoner had said that the spoons were Elkington's A., instead of that they were equal to Elkington's A., the conviction would have been good. Here the prisoner stated that the chain was 15-carat gold.

(1) Dears. & B. C. C. at p. 273. (2) Dears. & B. C. C. at p. 278.

(3) Dears. & B. C. C. 265.

1871

THE QUEEN
v.
ARDLEY.

BYLES, J. I am of the same opinion. In so deciding we do not at all infringe the principle acted upon in *Reg. v. Bryan*. (1) That case was governed by the maxim, "Simplex commendatio non obligat." In this case there was a specific statement that the buyer was getting 15 carats of pure gold when in fact he was only getting six.

CHANNELL, B. I am of the same opinion. And I so decide on the ground that the chairman was not bound by the authority of *Reg. v. Bryan* (1) to withdraw the case from the jury.

PIGOTT, B. I am of the same opinion. I, too, do not wish to bring mere exaggerated commendation within the criminal law.

Conviction affirmed.

Attorneys for prosecution : *Shum & Crossman*.

(1) Dears. & B. C. C. 265.

END OF HILARY TERM, 1871.

CASES

DETERMINED BY THE

COURT FOR CROWN CASES RESERVED

IN

EASTER TERM, XXXIV VICTORIA.

THE QUEEN v. JOHN CHILD.

1871

*Malicious Injury to Property—Setting Fire to Goods in a Building—24 & 25
Vict. c. 97, s. 7.*

April 22.

By 24 & 25 Vict. c. 97, s. 7, whosoever shall unlawfully and maliciously set fire to any matter or thing being in, against, or under any building, *under such circumstances that if the building were thereby set fire to the offence would amount to felony*, is guilty of felony.

The prisoner, from illwill and malice against a person lodging in a house, made a pile of her goods on the stone floor of the kitchen, and set fire to them, under such circumstances that the house would almost certainly have been burned had not the police extinguished the fire before the house was actually ignited. The judge at the trial told the jury, that if the house had caught fire from the burning goods, the question whether the offence would have amounted to felony, would have depended upon whether such a setting-fire to the house would have been malicious and with intent to injure, so as to bring the case within 24 & 25 Vict. c. 97, s. 3; and that, though the prisoner's object was only to destroy the goods and injure the owner of them, and not to destroy the house or injure the landlord, yet if they thought he was aware that what he was doing would probably set the house on fire, and so necessarily injure the owner, and was at best reckless whether it did so or not, they ought to find that if the building had caught fire from the setting fire to the goods, the offence would have been felony, otherwise not. The jury found that the prisoner was guilty, but not so that if the house had caught fire the setting fire to the house would have been wilful and malicious:—

Held, that upon the finding of the jury the prisoner was not guilty of felony.

CASE stated by BLACKBURN, J.

Indictment containing two counts: the first, "that the prisoner unlawfully, maliciously, and feloniously did set fire to divers goods

1871
THE QUEEN
v.
CHILD.

and chattels, the property of Fanny Goldsmith, then and there being in a building, to wit a dwelling-house, with intent thereby to injure."

The second count alleged, that it was "under such circumstances that if the building had been thereby set fire to, the offence would have amounted to felony."

The prisoner was tried at the Norfolk Spring Circuit.

The evidence was, that the prisoner, from illwill and malice against the prosecutrix, broke up her chairs, tables, and other furniture, made a pile of them and her clothes on the stone floor of the kitchen of her lodgings, and lit them at the four corners, so as to make a bonfire of them. The building would almost certainly have been burned in consequence, had not the police, who were sent for, succeeded in extinguishing the bonfire which the prisoner had kindled before the house was actually ignited.

For the prosecution, 24 & 25 Vict. c. 97, s. 7 (1), was cited. The learned judge held that the true construction of that enactment was not such as to make it felony maliciously to set fire to goods in a dwelling-house, per se, and consequently that the first count, though it was proved, was not good in law; and on the second count, that if the dwelling-house in which the goods were had caught fire from the burning goods, the question whether the offence would have amounted to felony depended upon a further question—viz., whether such a setting fire to the dwelling-house would have been malicious and with intent to injure, so as to bring the case within 24 & 25 Vict. c. 97, s. 3 (2). As to this, he explained to the jury, that though the prisoner's object was only to destroy the furniture and injure the owner of it, and not to destroy the house or injure the landlord, yet if the jury thought that he was aware that what he was doing would probably set the building on fire, and so necessarily injure the owner, and was at best reckless whether it did so or not, they ought to find that if the building

(1) 24 & 25 Vict. c. 97, s. 7, enacts, that "whosoever shall unlawfully and maliciously set fire to any matter or thing being in, against, or under any building, under such circumstances that if the building were thereby set fire to, the offence would amount to felony,

shall be guilty of felony. . . ."

(2) 24 & 25 Vict. c. 97, s. 3, enacts, that "whosoever shall unlawfully and maliciously set fire to any house . . ., with intent thereby to injure or defraud any person, shall be guilty of felony. . . ."

had caught fire from the setting fire to the goods, the offence would have been felony, otherwise not.

1871

THE QUEEN
v.
CHILD.

The jury found that the prisoner was guilty, but not so that if the house had caught fire the setting fire to the house would have been wilful and malicious.

The question for the Court was, whether, on the evidence and finding of the jury, the prisoner was properly convicted upon either count.

April 22. No counsel appeared.

BOVILL, C.J. The question reserved in this case is as to the construction of 24 and 25 Vict. c. 97, s. 7, which enacts, that "who-soever shall unlawfully and maliciously set fire to any matter or thing being in, against, or under any building, under such circumstances that, if the building were thereby set fire to, the offence would amount to felony, shall be guilty of felony." The indictment was framed in the terms of this section. The evidence was that the prisoner, from illwill and malice against the owner of goods in a house, set fire to those goods, under such circumstances that the house would almost certainly have been burned if the fire had not been extinguished. But, in fact, the house was not set on fire. Upon these facts the learned judge left it to the jury to say whether, if the house had caught fire, the setting fire to it would have been malicious and with intent to injure. And he told them that if they thought the prisoner was aware that what he was doing would probably set the building on fire, and so necessarily injure the owner, and was at best reckless whether it did so or not, they ought to find that if the house had caught fire the offence would have been felony. The jury found the prisoner guilty, but not so that if the house had caught fire the setting fire to it would have been wilful and malicious. By that finding, I think they negatived the whole of what the learned judge left to them, and found, in effect, that the prisoner was not aware that what he was doing would probably set fire to the house, and so injure the owner, and was not reckless whether it did so or not. The only finding of the jury, therefore, is that the goods were set on fire with intent to injure the owner of the goods. Now, there is no section in the

1871
THE QUEEN
v.
CHILD.

Act which makes the wilful and malicious setting fire to goods felony. The only section which could be applicable to the case is s. 7; and if we were to hold the case to be within that section, we should be rejecting the words, "under such circumstances that if the building were thereby set fire to the offence would amount to felony." I think that, to come within those words, the facts must have some relation to the house; and that they point to circumstances under which, if the house caught fire, the offence would fall within some of the earlier sections of the Act. But the case does not fall within any of them. It is a simple case of wilfully and maliciously setting fire to goods, and no more felony than setting fire to a box of matches on a stone floor.

MARTIN, B. I am of the same opinion. The first count is bad in law. As to the second, the jury have negatived a material averment.

BRAMWELL, B. I am of the same opinion. I think, if the house had caught fire in this case, the prisoner ought to have been acquitted upon a charge of wilfully and maliciously setting fire to the house. I understand the jury to have found not only that the prisoner did not intend to set fire to the house, but that he thought what he was doing would not do so.

BYLES, J. I am of the same opinion. The jury have negatived even recklessness on the part of the prisoner.

BLACKBURN, J. I am of the same opinion. I reserved the question for this Court, because I thought the framers of the section in question intended to include this case. But they have failed to express their intention. The earlier enactment, 14 & 15 Vict. c. 19, s. 8, made it felony wilfully and maliciously to set fire to goods "being in any building the setting fire to which is made felony, &c." And under those words the prisoner might have been convicted of felony under both counts. But the Consolidating Act uses different words. It speaks of setting fire to goods in a building "under such circumstances that if the building were thereby set fire to, the offence would amount to felony." It

appears from Mr. Greaves' note, in his edition of the Consolidation Acts (p. 165), that this change of language was deliberate. His opinion is, that if you set fire to one thing under such circumstances that you are likely thereby to set fire to another thing, then if the setting fire to the one is malicious, the setting fire to the other is so too: Russell on Crimes, vol. i. p. 742, note (b), 4th edition. If that is good law, then the setting fire to the house here, if it had caught fire, would have been felony. But it is not law, and the framers of the Act have failed to express the meaning that they intended to express.

Conviction quashed.

1871

THE QUEEN
v.
CHILD.

THE QUEEN v. JOHN WHITE, WILLIAM WHITE, AND MARIA WHITE.

May 6.

Abandoning and Exposing Child under Two Years, whereby its Life is Endangered—24 & 25 Vict. c. 100, s. 27—Duty of Father.

A woman who was living apart from her husband, and who had the actual custody of their child, under two years of age, brought the child, on the 19th of October, and left it at the father's door, telling him she had done so. He knowingly allowed it to remain lying outside his door, and subsequently in the roadway, from about 7 P.M. till 1 A.M., when it was removed by a constable, the child then being cold and stiff:—

Held, that though the father had not had the actual custody and possession of the child, yet, as he was by law bound to provide for it, his allowing it to remain where he did was an abandonment and exposure of the child by him, whereby its life was endangered, within the meaning of 24 & 25 Vict. c. 100, s. 27.

CASE stated by the Chairman of the Hants Quarter Sessions.

Indictment under 24 & 25 Vict. c. 100, s. 27 (1), for unlawfully and wilfully abandoning and exposing a child under the age of two years, whereby the life of the child was endangered.

At the trial at Winchester, it appeared from the evidence that Emily White (the wife of William White), who was not included in the indictment, was the mother of the child, which was about nine

(1) 24 & 25 Vict. c. 100, s. 27, whereby the life of such child shall be enacted that, "Whosoever shall unlawfully abandon or expose any child, endangered, . . . shall be guilty of a misdemeanour." . . . being under the age of two years,

1871
THE QUEEN
v.
WHITE.

months old at the time mentioned in the indictment. On the 19th of October, 1870, she had an interview with her husband, from whom she had been living apart since the 11th of August of the same year, and asked him if he intended to give her money or victuals; he passed by her without answering, and went into his house; this was about 7 P.M. His mother, the prisoner Maria White, shut the wicket of the garden, and forbade his wife from coming in; the wife then went to the door of the house, laid the child down close to the door, and called out, "Bill, here's your child, I can't keep it—I am gone." She left, and was seen no more that night. Shortly after, William White came out of the house, stepped over the child, and went away. About 8.30 P.M. two witnesses found the child lying in the road outside the wicket of the garden, which was a few yards from the house-door; it was dressed in short clothes, with nothing on its head; they remained at the spot till about 10 P.M., when William White came home. They told him that his child was lying in the road; his answer was, "It must bide there for what he knew, and then the mother ought to be taken up for the murder of it." Another witness, Maria Thorn (the mother of his wife), deposed also to the fact that about the same time, in answer to her observation that he ought to take the child in, he said, "He should not touch it—those that put it there must come and take it." She then went into the house. About 11 P.M., one of the two witnesses went for a police constable, and returned with him to the place about 1 A.M., when the child was found lying on its face in the road, with its clothes blown over its waist, and cold and stiff. The constable took charge of it, and by his care it was restored to animation. At 4.30 A.M. the constable went to the house, and asked William White if he knew where his child was; he said, "No." On being asked if he knew it was in the road, he answered, "Yes." It appeared that, during the time which elapsed between William White leaving his house, about 7 P.M., and his return, about 10 P.M., he had been to the police constable stationed at Beaulieu, and told him that there had been a disturbance between him and his wife, and wished him to come up and settle it, but he did not say anything about the child.

The prisoner's counsel objected that upon these facts there was

no evidence of abandonment or exposure, under the Act, by William White. 1871

He also objected that there was no evidence against John White and Maria White.

THE QUEEN
v.
WHITE.

The Court were of opinion that there was no evidence against the two last-named prisoners, but overruled the objection as to William White, as to whom the case was left to the jury, who found him guilty.

The question for the Court was, whether the prisoner, William White, was properly convicted upon the facts as above stated.

April 29. No counsel appeared.

Cur. adv. vult.

May 6. BOVILL, C.J. We have considered this case, and we are of opinion that the conviction was right, and ought to be affirmed. The prisoner was indicted, under 24 & 25 Vict. c. 100, s. 27, for unlawfully abandoning and exposing a child, under the age of two years, whereby its life was endangered. On the facts stated in the case the objection was taken that there was no evidence of abandonment or exposure. Now, the prisoner was the father of the child, and as such was entitled to the custody and control of it, and was not only morally but legally bound to provide for it. Then it appears that when the child was lying at the door he saw it, stepped over it, and left it there. Afterwards, when the child was in the road, he knew it was there. I am clearly of opinion that there was evidence here upon which the jury might and ought to convict the prisoner. Instead of protecting and providing for the child, as it was his duty to do, he allowed it to remain lying, first at his door, and afterwards in the road, insufficiently clothed, and at a time of year when the result was likely to be the child's death. I think, therefore, he was guilty both of abandonment and exposure.

MARTIN, B. I am of the same opinion, though I have entertained some doubt upon the question. The statute makes it an offence unlawfully to abandon or expose a child, and, construing these words according to their natural meaning, I thought at first that they could only apply to persons who had had the actual

1871
THE QUEEN
v.
WHITE.

custody and possession of the child. But as the prisoner here was the father of the child, entitled to its custody and legally bound to its protection, I do not differ from the rest of the Court.

BRAMWELL, B. I am of the same opinion. If the person who had had the actual custody of the child, and who left it at its father's door, had been a stranger with whom it had been left at nurse, there could, I think, have been no doubt about the case; and I do not think the fact that it was the mother makes any difference.

BLACKBURN, J. I am of the same opinion. The question turns upon the meaning of the words "abandon or expose" in the statute. The Court before whom the prisoner was tried were right in directing the acquittal of the two other persons accused, because there was no legal duty upon them to protect the child, but only a duty of imperfect obligation. But the father's case is different; for upon him there is a strict legal duty to protect the child. And when the child is left in a position of danger of which he knows, and from which he has full power to remove it, and he neglects his duty of protection, and lets the child remain in danger, I think this is an exposure and abandonment by him. If the child had died, the facts were such that a jury might have convicted him of murder, though they might have taken a more merciful view, and found him guilty only of manslaughter; and as the child, though its life was endangered, did not die, the case is within the section.

CHANNELL, B. My Brother Byles, who was a member of the Court when the case was first before the Court, concurs in the judgment; and, having had an opportunity of considering the case this morning, I am of the same opinion.

Conviction affirmed.

THE QUEEN v. LEWIS TOWNLEY.

1870

April 27.

Larceny—Animals feræ naturæ—Killing and Removal after an Interval of Time—Continuous Act.

Poachers, of whom the prisoner was one, wrongfully killed a number of rabbits upon land belonging to the Crown. They placed the rabbits in a ditch upon the same land, some of the rabbits in bags, and some strapped together. They had no intention to abandon the wrongful possession of the rabbits which they had acquired by taking them, but placed them in the ditch as a place of deposit till they could conveniently remove them. About three hours afterwards the prisoner came back, and began to remove the rabbits:—

Held, that the taking of the rabbits and the removal of them were one continuous act, and that the removal was therefore not larceny.

CASE stated by Blackburn, J.

The prisoner and one George Dunkley were indicted at the Northampton Spring Assizes for stealing 126 dead rabbits. In one count they were laid as the property of William Hollis, in another as being the property of the Queen. There were also counts for receiving.

It was proved that Selsey Forest is the property of Her Majesty.

An agreement between Mr. Hollis and the Commissioners of the Woods and Forests on behalf of Her Majesty was given in evidence, which the learned judge thought amounted in legal effect merely to a licence to Mr. Hollis to kill and take away the game, and that the occupation of the soil, and all rights incident thereto, remained in the Queen. No point, however, was reserved as to the proof of the property as laid in the indictment.

The evidence shewed that Mr. Hollis' keepers, about eight in the morning on the 23rd of September, discovered 126 dead and newly-killed rabbits and about 400 yards of net concealed in a ditch in the forest, behind a hedge close to a road passing through the forest.

The rabbits were some in bags, and some in bundles strapped together by the legs, and had evidently been placed there as a place of deposit by those who had netted the rabbits.

The keepers lay in wait, and at about a quarter to eleven on the same day Townley, and a man who escaped, came in a cab driven

1871
 THE QUEEN
 v.
 TOWNLEY.

by Dunkley along the road, Townley and the man who escaped left the cab in charge of Dunkley, and came into the forest, and went straight to the ditch where the rabbits were concealed, and began to remove them.

The prisoners were not defended by counsel.

It was contended by the counsel for the prosecution that the rabbits on being killed and reduced into possession by a wrongdoer became the property of the owner of the soil, in this case the Queen: *Blade v. Higgs* (1); and that even if it was not larceny to kill and carry away the game at once, it was so here, because the killing and carrying away was not one continued act.

Hale's Pleas of the Crown, vol. i., p. 510, and *Lee v. Risdon* (2), were cited.

The jury, in answer to questions from the learned judge, found that the rabbits had been killed by poachers in Selsey Forest, on land in the same occupation and ownership as the spot where they were found hidden.

That Townley removed them knowing that they had been so killed, but that it was not proved that Dunkley had any such knowledge.

The learned judge thereupon directed a verdict of not guilty to be entered as regarded Dunkley, and a verdict of guilty as to Townley, subject to a case for the Court of Criminal Appeal.

It was to be taken as a fact that the poachers had no intention to abandon the wrongful possession of the rabbits which they had acquired by taking them, but placed them in the ditch as a place of deposit till they could conveniently remove them. (3)

The question for the Court was, whether on these facts the prisoner was properly convicted of larceny.

April 22. No counsel appeared.

BOVILL, C.J. The prisoner in this case has been convicted of felony in stealing rabbits, and the question is, whether he has been properly convicted. The facts are, that the rabbits, 126 in number,

(1) 11 H. L. C. 621; 34 L. J. (C. P.) 286.

(2) 7 Taunt. 189, at p. 191.

(3) It was stated by Blackburn, J.,

though the fact did not appear upon the case, that the prisoner Townley was one of the poachers who killed the rabbits.

were taken and killed upon land the property of the Crown. The rabbits were then, together with 400 yards of net, placed in a ditch on the same land on which they had been taken; some of them being in bags, and some in bundles strapped together by the legs. They were placed there by the poachers, who in so placing them had no intention to abandon the wrongful possession which they had acquired by taking them, but placed them in the ditch as a place of deposit till they could conveniently remove them. Here they were found by the keepers at about eight in the morning. At about a quarter to eleven the prisoner arrived, went straight to the place where the rabbits were concealed, and began to remove them.

1871

 THE QUEEN
 v.
 TOWNLEY.

Now, the first question is as to the nature of the property in these rabbits. In animals *feræ naturæ* there is no absolute property. There is only a special or qualified right of property—a right *ratione soli* to take and kill them. When killed upon the soil they become the absolute property of the owner of the soil. This was decided in the case of rabbits by the House of Lords in *Blade v. Higgs* (1). And the same principle was applied in the case of grouse in *Lord Lonsdale v. Rigg* (2). In this case therefore the rabbits, being started and killed on land belonging to the Crown, might, if there were no other circumstance in the case, become the property of the Crown. But before there can be a conviction for larceny for taking anything not capable in its original state of being the subject of larceny, as for instance, things fixed to the soil, it is necessary that the act of taking away should not be one continuous act with the act of severance or other act by which the thing becomes a chattel, and so is brought within the law of larceny. This doctrine has been applied to stripping lead from the roof of a church, and in other cases of things affixed to the soil. And the present case must be governed by the same principle. It is not stated in the case whether or not the prisoner was one of the poachers who killed the rabbits. But my Brother Blackburn says that such must be taken to be the fact. Under all the circumstances of the case I think a jury ought to have found that the whole transaction was a continuous one; and the conviction must be quashed.

(1) 11 H. L. C. 621; 34 L. J. (C.P.) 286. (2) 1 H. & N. 923; 26 L. J. (Ex.) 196.

1871

THE QUEEN
v.
TOWHLEY.

MARTIN, B. I am of the same opinion. I think it is of the utmost importance that the criminal law should rest upon plain and simple principles. Now if a man kills a rabbit and carries it away at once it is clearly not larceny. But it is said that if he leaves it for a little time before carrying it away, it is. And in support of this view a passage from Hale's Pleas of the Crown, p. 510, is relied on, where he says, "If a man come to steal trees, or the lead of a church or house, and sever it, and after about an hour's time or so come and fetch it away, this hath been held felony, because the act is not continued but interpolated, and so it was agreed by the Court of King's Bench, 9 Car. 2, upon an indictment for stealing the lead of Westminster Abbey." A dictum of Gibbs, C.J. in *Lee v. Risdon* (1) to the same effect is also cited. Those statements may be perfectly correct, and ought perhaps to be followed in cases exactly similar in their facts, where there has been an actual abandonment of possession of the things taken. But here it is expressly found that there was no abandonment. And where the act is merely interrupted I think it more reasonable to hold that there is no larceny.

BRAMWELL, B. I am of the same opinion. And I think our decision is consistent with the passage cited from Hale, and the dictum of Gibbs, C.J., referred to, which appear to me quite correct. If a man were unlawfully to dig his neighbour's potatoes, and from being disturbed in his work, or any other cause, were to abandon them at the place where he had dug them, and were afterwards with a fresh intention to come back and take them away, I think the case would be the same as if during this interval of time the potatoes had been locked in a cupboard by the true owner. Wherever, in such cases, the goods may be said to have been in the possession of the true owner in the interval between the severance and the removal, I think the removal is larceny. But is that so in this case? If the poachers had taken these rabbits to their own house, or to a public-house, can it be supposed that the subsequent removal of them from there would have been larceny? And if the case be varied by supposing them to have placed them upon land adjoining that on which they were killed, can that make any

(1) 7 Taunt. 188, at p. 191.

difference? And if so, how can it be otherwise, because the place of deposit chosen is upon the land of the same owner on whose grounds the rabbits were killed. The case seems to me not to fall within the rule laid down by Hale, for, to use his words, the act here was "continued."

1871
THE QUEEN
v.
TOWNLEY.

BYLES, J. I am of the same opinion, though I have entertained some doubts. It is here proved as a fact that the possession of the poachers was never abandoned; and, in fact, the rabbits from the time they were taken remained, in part at least, in the bags of the poachers. I think, therefore, the whole transaction must be regarded as one continuous transaction.

BLACKBURN J. I am of the same opinion. To constitute larceny at common law it was necessary that the thief should both take and carry away. And it was early settled that in the case of a thing like a tree, for instance, when the very act which converted it into a chattel was accompanied by the taking of it away, there was no larceny. Almost all the cases falling within this rule have since been made larceny by statute; but the common law rule remains the same. Even in the case of *Blades v. Higgs* (1), in which it was held that game when killed becomes the property of the owner of the land upon which it was raised and killed, it was expressly pointed out that it by no means followed that an indictment for larceny would lie. The doctrine is a very early one; see Book of Assizes, 12th year, par 32, where it was applied to the case of trees. The result is, that while taking away dead game is larceny, it is otherwise where the killing and taking away are one continuous act.

Now, to apply these principles to the present case, I do not think it makes any great difference that the prisoner was himself one of the poachers; I think the result would be the same if he had been the servant of a dealer with knowledge of the circumstances under which the rabbits had been killed. But then there is the fact that the rabbits after being killed were left hidden in a ditch upon the land for nearly three hours. I should myself have thought that that made no difference in the case; but a passage has been cited from

(1) 11 H. L. C. 621; 34 L. J. (C.P.) 286.

1871

THE QUEEN
v.
TOWNLEY.

Lord Hale in which he says, that if you strip lead from a church, "and after about an hour or so come and fetch it away," this is larceny; and he speaks of this as decided law, citing Dalton as his authority. A dictum of Gibbs, C.J., to the same effect has also been referred to. If we are to understand these passages in the sense put upon them by my Brother Bramwell, as applying only to a case in which the wrongdoer has abandoned and lost all property and possession in the things in question, I have no quarrel with them, and they do not apply to the present case. But if those passages mean that the mere cessation of physical possession is sufficient to make the subsequent act of removal larceny, then they do apply to the present case. And in that case, great as is my respect for Lord Hale, I cannot follow him. I cannot see that it makes any difference whether those who have taken game hide it in one place or hide it in another.

Conviction quashed.

April 29.

THE QUEEN v. THOMAS FLETCHER.

Perjury—Jurisdiction—Bastardy Summons—Application before Birth of Child—Deposition—7 & 8 Vict. c. 101, s. 2; 8 Vict. c. 10, s. 1.

Section 2 of 7 & 8 Vict. c. 101, enacts that where application for a bastardy summons is made before the birth of the child, "the woman shall make a deposition upon oath."

The prisoner was convicted of perjury, alleged to have been committed on the hearing of a bastardy summons. It appeared that the summons had been issued against the prisoner before the birth of the child. Upon the application for it no written deposition was made, but only a verbal statement upon oath by the woman. The prisoner appeared to the summons, and made no objection to its validity or to the jurisdiction of the Court:—

Held that, the Court had jurisdiction to hear the summons, and that the conviction for perjury was right.

Per Martin, B., Byles, and Blackburn, JJ.: The word "deposition" in the above section means evidence taken down in writing.

Per Blackburn, J.: The enactment is only directory, and the absence of a deposition could not oust the jurisdiction.

Per *totam Curiam*: The irregularity was waived by the prisoner's appearing to the summons and not objecting.

CASE stated by Cleasby, B.

The prisoner was tried at the Spring Assizes for the county of

Derby, for perjury alleged to have been committed by him at the hearing of an affiliation summons.

1871

THE QUEEN
v.
FLETCHER.

The following is a copy of the summons:—

“Derbyshire to wit.

“To Thomas Fletcher, of Heanor, in the County of Derby.

“Whereas, application hath this day been made to me, the undersigned, one of Her Majesty’s Justices of the Peace for the County of Derby, by Jane Beswick, single woman, residing at Heanor, in the petty sessional division of the said county for which I act, now with child, of which child she hath this day duly sworn on oath before me, the said justice, that you are the father, for a summons to be served on you to appear at a petty session of the peace, according to the form of the statute in such case made and provided.

“These are therefore to require you to appear at the petty session of the justices, holden at the justice room in Heanor, in the said county, being the petty session for the division in which I usually act, on Monday, the first day of August, in the year of our Lord one thousand eight hundred and seventy, at eleven o’clock in the forenoon, to answer any complaint which she shall then and there make against you touching the premises. Herein fail you not.

“Given under my hand at Heanor, in the said county of Derby, this twenty-fifth day of April, one thousand eight hundred and seventy.

“M. MUNDY.

“NOTE.—If you neglect to appear at the petty sessions, as above stated, the justices, upon proof that this summons has been duly served upon you, or left at your last place of abode, may proceed, if they think fit, at the petty sessions therein named, to make an order upon you, as the putative father of the child above referred to, to pay a weekly sum to the said mother for its maintenance, and other sums for costs and expenses.

“Summons on application before birth.”

The application for the summons was made before the birth of the child, and the magistrate’s clerk, who was called as a witness on the trial of the indictment, stated that no written deposition

1871
THE QUEEN
v.
FLETCHER.

was made upon the application. He also stated that when the application was made the complainant was sworn, and verbally made a statement to the effect stated in the summons.

The counsel for the prisoner referred to the statutes 7 & 8 Vict. c. 101; 8 Vict. c. 10 (1), and contended that it was essential that there should be a deposition in writing upon oath to give the magistrate jurisdiction to hear the case.

The prisoner was convicted.

The question for the Court was, whether it is essential to give the magistrate jurisdiction to hear the application summons, that there should have been a written deposition upon oath by the complainant when the application for the summons was made.

April 29. *Bristow* for the prisoner. The summons in this case was issued before the birth of the child, and in such case 7 & 8 Vict. c. 101, s. 2 expressly requires that there shall be a deposition on oath by the woman. "Deposition" always means evidence either given in writing, or at least reduced to writing at the time. In Bouvier's Law Dictionary, "deposition" is defined as "the testimony of a witness reduced to writing, in due form of law, by virtue of a commission or other authority of a competent tribunal; or, according to the provisions of some statute law, to be used on the trial of some question of fact in a court of justice."

(1) 7 & 8 Vict. c. 101, s. 2, enacts that "any single woman who may be with child, or who may be delivered of a bastard child . . . may either before the birth, or at any time within twelve months from the birth of such child, or at any time thereafter, upon proof that the man alleged to be the father of such child has within the twelve months next after the birth of such child paid money for its maintenance, make application to any one justice of the peace . . . for a summons to be served on the man alleged by her to be the father of such child; and if such application be made before the birth of the child, the woman shall make a deposition upon oath, stating who is the father of such child,

and such justice of the peace shall thereupon issue his summons to the person alleged to be father of such child, to appear at a petty session . . ."

8 Vict. c. 10, s. 1, enacts that, "where any proceedings have been had or taken before the passing of this Act, or shall hereafter be had or taken in bastardy, under the provisions of 7 & 8 Vict. c. 101, and shall have been set forth according to the forms in the schedule hereunto annexed, or to the like tenor and effect, the same shall be taken respectively to have been and to be valid and sufficient in law. . . ."

The schedule to this Act contains, with other forms, a form of application by a woman with child.

Webster's Dictionary defines depose, "to give testimony on oath, especially to give testimony which is committed to writing." So in Tomlin's Law Dictionary, several kinds of depositions are described, but all have to be taken down in writing. And the later Act (8 Vict. c. 10, s. 1), though it is not in express terms incorporated with the earlier Act, shews what kind of deposition upon oath ought to be made. A form is given; and that being so, the whole foundation of the proceedings fails. In this respect the case differs from *Reg. v. Berry* (1); *Reg. v. Smith* (2); *Reg. v. Shaw* (3). In those cases the objection was to the absence of a summons or to some defect in the summons. Here the objection is that there never was any jurisdiction to issue a summons or entertain the case at all. *Reg. v. Simmons* (4); *Reg. v. Millard* (5); and *Reg. v. Pearce* (6), were also referred to.

1871
THE QUEEN
v.
FLETCHER.

No counsel appeared for the prosecution.

BOVILL, C.J. Mr. Bristow has argued this case extremely well, and said all that could be said on behalf of the prisoner; but I think the conviction must be affirmed. The jurisdiction of the magistrates to hear the case depends on 7 & 8 Vict. c. 101, s. 3, which says, on appearance of the person summoned, "the justices in such petty sessions shall hear the evidence of such woman, and such other evidence as she may produce, and shall also hear any evidence tendered by or on behalf of the person alleged to be the father; and if the evidence of the mother be corroborated in some material particular by other testimony, to the satisfaction of the said justices, they may adjudge the man to be the putative father of such bastard child; and they may also, if they see fit, having regard to all the circumstances of the case, proceed to make an order on the putative father" for the payment of money. In this case there was such a hearing of a summons against the prisoner. The prisoner was examined on that hearing, and swore falsely. For that he is indicted for perjury. The objection now taken is

(1) Bell C. C. 46; 28 L. J. (M.C.) 86.

(2) Ante, p. 110.

(3) Leigh & Cave C. C. 579; 34 L. J. (M.C.) 169.

(4) Bell C. C. 168; 28 L. J. (M.C.) 183.

(5) 1 Dears. & P. C. C. 166; 22 L. J. (M.C.) 108.

(6) 3 B. & S. 531; 32 L. J. (M.C.) 75.

1871
 THE QUEEN
 v.
 FLETCHER.

that the summons was irregularly issued, because there was no sufficient deposition on oath before it was issued.

It has been suggested that under the section in question there must be a written statement on oath—in fact, an affidavit—by the woman; but I think at any rate an oral statement, taken down in writing in the usual way in which depositions are taken, must be sufficient. Jervis's Act, being later in time, cannot apply here; but certainly more than that Act prescribes cannot be required. The second Act referred to (8 Vict. c. 10, s. 1) does not affect the case. That Act only says that proceedings according to the forms in the schedule, or to the like tenor and effect, shall be valid and sufficient; it does not say that those forms must be used. Then, if all that the Act requires be that the magistrate shall make a record of the evidence orally given, the summons itself seems to me very like a writing to the same tenor and effect with the form of deposition in the schedule to the second Act.

But supposing the irregularity to have been ever so great, even if there had been no statement on oath at all, how would the law be then? In that case *Reg. v. Berry* (1) is a decision in point. The 7 & 8 Vict. c. 104, s. 2, authorizes the issue of the summons in several different cases. One is after the lapse of twelve months from the birth, in which case a summons may issue upon proof of payment of money by the alleged father during the twelve months next after the birth. Another is before birth, in which case the summons is to issue upon the woman making a deposition on oath. In *Reg. v. Berry* (1) the question arose as to the first of these two cases. That was an indictment for perjury committed on the hearing of an affiliation summons. It appeared that the summons had been issued more than twelve months after the birth of the child, and that there had been no proof—no proof within the meaning of that word in law—of the payment of money within twelve months after birth. The case was, therefore, precisely the same as the present; and all the judges composing the Court, except my Brother Martin, after taking time to consider, held that the conviction ought to be affirmed, on the ground that the defendant, by appearing and not objecting, had waived any irregularity in the issue of the summons. Lord Campbell there said (2):

(1) Bell C. C. 46; 28 L. J. (M.C.) 86.

(2) Bell C. C. at p. 59.

"The proceeding against the putative father of a bastard child, to obtain an order of affiliation and maintenance, is not a proceeding in pœnam to punish for a crime, but merely to impose a pecuniary obligation, and is a civil suit within the meaning of 14 & 15 Vict. c. 99, ss. 2, 3: *Reg. v. Lightfoot*. (1) For this reason the defendant was admitted as a witness on his own behalf. Then what is the summons which we have to consider? Mere process to bring the defendant into court in a civil suit. I incline to think that, according to strict regularity, before the summons issued, there ought to have been evidence on oath of the payment of the money, although it is not expressly required by the statute to be on oath, as is the case where the complaint is made before the birth of the child. Further, it would have been proper that the summons should have been in the form given by the Act of Parliament. But supposing that, if the defendant had not appeared, the petty sessions could not lawfully have proceeded to hear evidence of the paternity; or that, if he had appeared and objected to the regularity of the summons, the objection ought to have prevailed, I am of opinion that when he actually appeared, and instead of objecting to the regularity of the summons, he asked the Court to give judgment in his favour, on the merits, he waived any irregularity there might be in the process; and that, when he had thus submitted himself to the jurisdiction of the Court, the Court had jurisdiction to hear and decide the suit." Here there was a summons and a statement on oath. But even if there had been no such statement, and no summons, still the defendant was before the magistrates, and they had jurisdiction to hear the case. The conviction must, therefore, be affirmed.

MARTIN B. I am of the same opinion. Section 2 of 7 & 8 Vict. c. 101, enacts that, if the application for a bastardy summons be made before the birth of the child, the woman shall make a deposition upon oath stating who is the father. I agree with Mr. Bristow that the word deposition requires something in writing. Webster's Dictionary defines "depose" as "to give testimony on oath, especially to give testimony which is committed to writing." Here I think the meaning of deposition is an oral statement taken

1871

 THE QUEEN
 v.
 FLETCHER.

(1) 6 E. & B. 822; 25 L. J. (M.C.) 115.

1871
THE QUEEN
v.
FLETCHER.

down in writing, and as the section referred to contains a positive enactment that when the application is before birth there shall be a deposition upon oath, there was an irregularity committed in the present case. But the prisoner by appearing to the summons waived the objection, and that being so, the justices before whom the summons was heard had power to proceed with the case, not as mere arbitrators, but in a judicial capacity. The proceeding was therefore a valid judicial proceeding sufficient to make the prisoner's false swearing in the course of it perjury, although there had been a defect of which he might have taken advantage.

BRAMWELL, B. I am of the same opinion.

BYLES, J. I am of the same opinion. I agree that deposition means a statement of evidence reduced to writing. I think that is the only meaning of the word. And when, in s. 3 of the Act referred to, a different thing is intended, different words are used, namely, "hear the evidence." The ground of my decision is that the summons is only a process to bring the defendant before the Court. Once before the Court, the proceeding is a judicial proceeding, and an indictment for perjury lies.

BLACKBURN, J. I am at present of opinion—though, perhaps, it is not strictly necessary to decide the point—that deposition means such a deposition as is described in Jervis's Act (11 & 12 Vict. c. 42). Jervis's Act is no doubt later in date than the Act with which we have now to deal, but it is in this respect mainly a continuation and re-enactment of earlier Acts. I think, therefore, that a deposition must, in the section now in question, mean evidence taken down in writing, though whether signature is necessary I do not say. But I do not think that any of the matters mentioned in s. 2 are more than directory. If the application be made more than twelve months after the birth of the child, it is to be upon proof that the man alleged to be the father has within twelve months after birth of the child paid money for its maintenance. If the application is before birth the woman is to make a deposition upon oath. If either of these things be omitted it is an irregularity for which the magistrate or his clerk

is blameable ; but it does not oust the jurisdiction. I think if these things were left out altogether the proceedings upon the summons would none the less be good, But however this may be, the irregularity may be and was waived by the defendant's appearing and not objecting. In *Reg. v. Berry* (1) this was expressly held to be so in the case of an application more than twelve months after birth where no proof had been given of payment of money within twelve months after birth. And I can see no distinction between the two cases.

1871

THE QUEEN
v.
FLETCHER.

Conviction affirmed.

Attorney for prisoner: *S. Leech, Derby.*

(1) Bell C. C. 46; 28 L. J. (M.C.) 86.

END OF EASTER TERM, 1871.

CASES

DETERMINED BY THE

COURT FOR CROWN CASES RESERVED

IN

TRINITY TERM, XXXIV VICTORIA.

1871

June 3.

THE QUEEN *v.* EDMUND BALLS.

Embezzlement—Indictment—Evidence—Three Acts of Embezzlement in One Indictment—24 & 25 Vict. c. 96, s. 71—31 & 32 Vict. c. 116, s. 1.

The prisoner was a member of a co-partnership. It was his duty to receive money for the co-partnership, and once a week to render an account and pay over the gross amount received during the previous week. During each of three several weeks, within six months, the prisoner received various small sums, and failed to account for them at the end of the week, or to pay over the gross amount, but embezzled the money:—

Held, that he might properly be charged with embezzling the weekly aggregates; that three acts of embezzlement of such weekly aggregates within six months might be charged and proved under one indictment; and that evidence of the small sums received during each week was admissible to shew how these aggregates were made up.

CASE stated by Mr. Commissioner Kerr.

Indictment, charging in the 1st count that the prisoner being a member of a certain co-partnership of persons trading under the name, style and title of the Alliance Industrial and Provident Coal Society, Limited, did on the 5th of December, 1870, receive into his possession the sum of 1*l.* 1*s.* in money, for and on the account of the said co-partnership, and fraudulently and feloniously did embezzle the said sum of money.

The 2nd count charged him with having within six months from the offence in the first count, that is to say, on the 12th of

December, while he was a member of the said co-partnership, received on account of the said co-partnership the further sum of 1*l.* 7*s.*, and with having embezzled that sum.

1871

THE QUEEN
v.
BALLS.

The 3rd count charged him with having within six months from the offences in the 1st and 2nd counts, that is to say, on the 19th of December, while he was a member of the said co-partnership, received on account of the said co-partnership the further sum of 1*l.* 5*s.*, and with having embezzled that sum.

At the trial at the Central Criminal Court on the 2nd of May, 1871, it was proved that the prisoner was a shareholder in the society named; that he received dividends on his shares therein, and that he was also duly appointed an agent of the society, in which capacity it was part of his duty to collect moneys for the society in the manner hereinafter mentioned. He gave a bond for the faithful performance of his duties. It was his duty as such agent and collector to receive payments from numerous persons who bought coals from the society, for which they were to pay by weekly instalments. Of these payments, which were to be made weekly, it was his duty to send in weekly accounts on the Tuesday of every week. And it was his duty on the Tuesday of every week to pay the gross amount received by him in the course of the preceding week into a bank to the credit of the society.

The prisoner did, in fact, pay money into the bank to the credit of the society, every week, both before, during, and after the time covered by the three several counts of the indictment. On some occasions he paid into the bank a larger sum than by his account of the previous week's collection he ought to have done.

To prove the allegation in the 1st count of the embezzlement of the sum of 1*l.* 1*s.* on the 5th of December, it was proposed by the counsel for the prosecution to give evidence of ten different payments in the course of the week ending on such 5th of December, that these payments were made to the prisoner by ten different persons, and that the several small sums so paid to him amounted in the whole to 1*l.* 1*s.* It was also proposed to prove that neither in the prisoner's account sent in by him on the 5th of December, when he ought to have accounted for the previous week's collec-

1871
THE QUEEN
v.
BALLS.

tion, nor in any subsequent account did the prisoner account for those several sums, or any of them, nor for any specific sum of 1*l.* 1*s.*

To prove the allegation in the 2nd count of the embezzlement of the sum of 1*l.* 7*s.* on the 12th of December, it was proposed also to prove by ten different witnesses ten different payments in the course of the week ending on that day, that the several small sums so paid amounted in the whole to 1*l.* 7*s.*, and that neither in the prisoner's account sent in by him on the said 12th of December, nor in any subsequent accounts did the prisoner account for those several sums, or any of them, nor for any specific sum of 1*l.* 7*s.*

To prove the allegation in the 3rd count of the embezzlement of the sum of 1*l.* 5*s.* on the 19th of December, it was proposed in like manner to prove by eleven different witnesses eleven different payments in the course of the week ending on that day, that the several small sums so paid amounted on the whole to 1*l.* 5*s.*, and that neither in the prisoner's account sent in by him on the said 19th of December, nor in any subsequent accounts did the prisoner account for those several sums, or any of them, nor for any specific sum of 1*l.* 5*s.*

The prisoner's counsel who was absent while the case was being opened to the jury, objected that the course proposed to be taken would be admitting evidence of thirty-one different acts of embezzlement upon one indictment, whereas the statute only permitted evidence to be given of three. He contended that the non-accounting for each of these thirty-one sums was a separate and distinct act of embezzlement, and that only three of those acts could properly be included in one indictment.

On the other hand, the counsel for the prosecution contended that as it was the prisoner's duty to account once a week only for what he had received during the preceding week, there were only three distinct non-accountings, and therefore only three distinct acts of embezzlement. That the act of embezzlement was not committed upon receipt of the money, but upon the non-accounting and non-payment of it, if the jury should find such non-accounting and non-payment to be fraudulent.

The learned commissoner expressed his intention to confine the evidence to three separate and distinct receipts of three of the small sums so received by the prisoner as aforesaid, and to the non-accounting for the same; but being pressed by counsel for the prosecution, he admitted the evidence so proposed to be given of the receipt by the prisoner of the thirty-one different sums, and of his non-accounting for the same.

1871

THE QUEEN
v.
BALLS.

This evidence was accordingly given; and the jury found that in not paying over on the 5th, 12th, and 19th days of December respectively, each and every of the several sums received by him, in each and every of the several weeks ending on those days respectively, the prisoner did fraudulently embezzle each and every of the said several sums, and that those sums collectively amounted in each of those weeks respectively to the several sums named in the 1st, 2nd, and 3rd counts of the indictment.

Thereupon, the learned commissioner directed a verdict of "guilty" to be recorded against the prisoner on each of these counts, subject to the opinion of the justices of either bench and Barons of the Exchequer whether the evidence on which the prisoner was so convicted was properly admissible. If such evidence was not admissible in point of law, then the conviction of the prisoner was to be quashed. If properly admitted, then the conviction was to stand.

June 3. *Collins*, for the prisoner. This indictment is under 31 & 32 Vict. c. 116, s. 1. But as to the number of acts of embezzlement which may be charged and proved, it is subject to the same rule as any other indictment for embezzlement. Before 24 & 25 Vict. c. 96, s. 71, only one act of embezzlement could be charged or proved under one indictment. That section allows three to be charged and proved if committed within six months. But the rule as to what is an act of embezzlement is not changed. Where a number of small sums are separately embezzled, you cannot add them all together and treat it as one embezzlement of the whole: *Reg. v. Williams* (1), 1 Taylor on Evidence, 346, 5th ed. Here the jury have expressly found that what the prisoner em-

(1) 6 C. & P. 626.

1871
THE QUEEN
v.
BALLS.

bezzled was, each and every of the small sums received by him in the course of each week. This distinguishes the case from *Reg. v. Lambert* (1).

[WILLES, J., referred to *Reg. v. Richardson* (2), and *Reg. v. Proud* (3)].

In those cases, evidence of numerous acts of embezzlement was admitted, not as substantive offences, but to shew the motive, and prove that the default charged as embezzlement was not accidental but wilful. That is not the object here.

Besley, for the prosecution, was not called upon.

COCKBURN, C.J. I am of opinion that this conviction is right, and must be affirmed. It is quite true that if a man receives a number of separate sums and has to account for each of them separately, only three instances of failure to account can be proved under one indictment. Thus, if there were to be one accounting on Monday, and one on Tuesday, and one on Wednesday, and so on, only three defaults could be charged and proved; though even in such a case, evidence of other instances might be given in order to shew that the instances charged were not merely accidental, but that what was done was done intentionally and fraudulently. But here no difficulty of this nature arises. I agree that the prisoner might have been indicted for embezzling any of the separate small sums received by him. But it appears upon the case that his duty was to receive the small sums from time to time; to send in the weekly accounts every Tuesday; and every Tuesday to pay the gross amount received by him during the preceding week into a bank. It is true that each of the small sums received had to be accounted for; but he might well be charged with embezzling the aggregate amount. And evidence of the individual items was admissible to shew how this aggregate was made up. It would be very mischievous if, in such cases as these, servants could not be indicted for embezzling the aggregate amounts for which they fail to account. No doubt, in such cases, there is an embezzlement of each of the smaller sums going to make up the

(1) 2 Cox. Cr. C. 309.

(2) 2 F. & F. 343.

(3) Leigh & Cave, C. C. 97; 31 L. J. (M.C.) 71.

total not accounted for; but there is not the less an embezzlement of the whole.

1871

THE QUEEN
v.
BALLS.

WILLES, MELLOR, and MONTAGUE SMITH, JJ., and CHANNELL, B.,
concurred.

Conviction affirmed.

Attorney for prisoner: *J. H. B. Wakeling.*

Attorney for prosecution: *W. T. Ricketts.*

END OF TRINITY TERM, 1871.

CASES

DETERMINED BY THE

COURT FOR CROWN CASES RESERVED

IN

MICHAELMAS TERM, XXXV VICTORIA.

1871
Nov. 18.

THE QUEEN *v.* HOLMES AND FURNESS.

*Indecent Assault—Attempt at Rape—Cross-examination of Prosecutrix—
Previous Connection with other Men—Contradiction—Evidence.*

The prosecutrix in an indictment for an indecent assault, which on the facts alleged amounted, in substance, to an attempt at rape, was asked in cross-examination whether she had not previously had connection with a man other than the prisoner, and denied it:—

Held, that she could not be contradicted.

CASE stated by the Chairman of Quarter Sessions for the county of Surrey.

At the general quarter sessions, holden at Kingston-upon-Thames, for the county of Surrey, on the 17th of October, 1871, Henry Holmes and Joseph Frederick Furness were tried upon an indictment charging them with indecently assaulting one Sarah Palmer.

It appeared from the evidence taken at the trial, the whole of which was set out, that the indecent assault charged amounted to an attempt at rape; and that for the defence consent was alleged.

The prosecutrix, in her cross-examination, was asked by the prisoner's counsel if she had had connection with Robert Sharp, and she denied it.

The prisoners' counsel called Robert Sharp, and asked him if the prosecutrix had ever had connection with him, but the counsel

for the prosecution objected to the question on the authority of *Reg. v. Cockroft* (1), and the Court refused to allow the question to be answered, but reserved the point, whether such answer ought to have been allowed to be given, for the decision of the Court for Crown Cases Reserved.

The jury found both prisoners guilty.

Straight, for the prisoners. The issue in this case being substantially one of consent or no consent, the evidence tendered was strictly relevant to the issue, as having a material bearing upon the probability of the prosecutrix' consent. *Reæ v. Hodgson* (2), which may be relied on upon the other side, is not in point. In that case it was held that the prosecutrix was not bound to answer a question as to previous connection with another man; a rule which may be doubted in the present day. And, inasmuch as the question was not answered by the prosecutrix, the evidence on the other side was not, as here, called in contradiction. *Reg. v. Robins* (3) is an express decision by Coleridge, J., with the concurrence of Erskine, J., that the evidence is admissible. In *Reæ v. Martin* (4), the same rule was laid down as to evidence of previous connection with the prisoner. And there is no reason for any distinction between the two cases. *Reæ v. Barker* (5), and *Reg. v. Clay* (6), shew that evidence of previous immorality is material to the issue. He also referred to *Reg. v. Arnall* (7), and *Reg. v. Eyre*. (8)

Oppenheim for the prosecution. The evidence was properly excluded. The question put to the prisoner was not relevant to the issue, it only went to credit. Upon principle, therefore, her answer is binding. And *Reæ v. Hodgson* (2) is a decision of all the judges against the admission of the evidence. *Reæ v. Clarke* (9) is to the same effect. The ruling in *Reg. v. Robins* (3) was wrong. And in *Reg. v. Cockroft* (1), Martin, B., and Willes, J., refused to follow it, and laid down the contrary rule. He also referred to a ruling of Keating, J., in a case not reported, to the same effect.

(1) 11 Cox, Cr. C. 410.

(2) R. & R. 211.

(3) 2 Moo. & R. 512.

(4) 6 C. & P. 562.

(5) 3 C. & P. 589.

(6) 5 Cox, Cr. C. 14ⁿ.

(7) 8 Cox, Cr. C. 439.

(8) 2 F. & F. 579.

(9) 2 Stark. N. P. C. 241.

1871

THE QUEEN
v.
HOLMES.

KELLY, C.B. The question raised in this case is one of very great importance; and if we had entertained any substantial doubt upon it, we should have thought it right to submit it for the opinion of all the judges. But when we look, first, at the principles applicable to the case, and, secondly, at authority, we think it is impossible to doubt what the decision ought to be. The question is, whether on an indictment for rape, or for attempt at rape, or for an indecent assault, amounting in substance to an attempt at rape, if the prosecutrix is asked in cross-examination whether she has had connection with another person not the prisoner, and denies it, evidence can be called to contradict her. We are all of opinion that it cannot. In the first place, the general rule of evidence is that if a question be put in cross-examination as to a collateral point, the answer must be taken for better or for worse. And the reason is obvious. If such evidence as that here proposed were admitted, the whole history of the prosecutrix's life might be gone into; if a charge might be made as to one man, it might be made as to fifty, and that without notice to the prosecutrix. It would not only involve a multitude of collateral issues, but an inquiry into matters as to which the prosecutrix might be wholly unprepared, and so work great injustice. Upon principle, therefore, we must hold that the answer is binding.

When we look at the authorities the case is still clearer. The first case on the subject is *Rex v. Hodgson*. (1) That case was heard first before eight of the judges, and afterwards before the whole number. It was an actual decision that the prosecutrix on a charge of rape was not bound to answer such a question as that here put. That seems, as a matter of principle, to involve that, if the question had been answered, the answer would have been binding. But, further, the second objection taken in that case seems to raise the very point; and upon that the judges lay down the law distinctly, in accordance with the view which we take. That case is therefore an actual decision involving in principle the point now in question, and a dictum, at the least, by some of the most learned judges who ever sat, upon the very point. *Reg. v. Cockcroft* (2) was an indictment for

(1) R. & R. 211.

(2) 11 Cox, Cr. C. 410.

rape, and was tried first before Martin, B., and again before Willes, J., and both of those learned judges held that such evidence as that here tendered was inadmissible. So far all the decisions entirely support that view which we think to follow clearly from the settled principles of the law of evidence. We are asked to abandon that view upon the authority of *Reg. v. Robins.* (1) That was no doubt a decision of Coleridge, J., after consulting Erskine, J., upon the very point now in dispute. But we cannot follow that ruling in opposition to the whole current of authority upon the question. In *Reg. v. Barker* (2) the question was as to evidence shewing the prosecutrix to be a common prostitute; and such evidence has long been held material. In *Reg. v. Martin* (3) the evidence was as to the prosecutrix having previously had connection with the prisoner. And such evidence is undoubtedly admissible, for it has a direct bearing upon the question of consent. These are really all the cases upon the subject. But from *Reg. v. Clarke* (4) it may be collected that Holroyd, J., held the same view in the case of an indictment for an attempt at rape. We have, therefore, a deliberate judgment of the twelve judges, the decisions of Martin, B., and Willes, J., and the opinion of Holroyd, J., against the ruling of Coleridge, J.

1871
THE QUEEN
v.
HOLMES.

BYLES, J. I think it quite clear that the prosecutrix in a charge of rape, or attempt at rape, cannot be contradicted by persons who swear that they have had connection with her, for a rape may be committed upon a prostitute. Then we have the authority of all the judges in *Reg. v. Hodgson* (5); and of Martin, B., and Willes, J., in *Reg. v. Cockroft.* (6) A ruling of Keating, J., to the same effect has been referred to. And I have had an opportunity of speaking both to him and to Willes, J., who are still of the same opinion.

PIGOTT, B. I think the evidence proposed to be given is not relevant to the issue; and its admission might lead to great injustice.

(1) 2 Moo. & R. 512.

(2) 3 C. & P. 589.

(3) 6 C. & P. 562.

(4) 2 Stark. N. P. C. 241.

(5) R. & R. 211.

(6) 11 Cox, Cr. C. 410.

1871

THE QUEEN
*
HOLMES.

LUSH, J. I was for a time of a different opinion. But I am now quite convinced that the evidence in question was too remote from the issue.

HANNEN, J. I think no distinction can be drawn between a case of rape and a case of indecent assault, when the offence charged is in substance an attempt at rape. Then *Rees v. Hodgson* (1) is a decision that such evidence as this cannot be given as substantial evidence in the cause, that is, cannot be regarded as relevant to the issue, but only as going to the credit of the witness. The witness's answer is therefore binding. And the reason is that the prosecutrix cannot come prepared to try all the issues which would be thus raised. The case is clear in principle, and it is also governed by authority.

Conviction affirmed.

Attorneys for prosecution: *J. C. & W. Rogers.*

Attorney for prisoners: *T. W. Bilton.*

Nov. 11.

THE QUEEN v. MANNING AND ROGERS.

Malicious Injury to Property—Arson—24 & 25 Vict. c. 97, s. 6—Building—Unfinished House.

A building, in 24 & 25 Vict. 97, s. 6, is not necessarily a finished structure.

An unfinished house, of which the walls were built and finished, the roof on and finished, a considerable part of the flooring laid, and the internal walls and ceilings prepared ready for plastering, *held*, to be a building within the meaning of the section.

CASE stated by Martin, B.

The prisoners were tried upon an indictment, which charged that they "feloniously, unlawfully, and maliciously did set fire to a certain building of one John Rhodes, there situate, against the form of the statute in such case made and provided."

It was framed upon 24 & 25 Vict. c. 97, s. 6. (2) The prisoners

(1) R. & R. 211.

(2) Sect. 6 of 24 & 25 Vict. c. 97, enacts that, "Whosoever shall unlawfully and maliciously set fire to any

building, other than such as are in this Act before mentioned, shall be guilty of felony"

were members of a society, or union, of Hand-made Brick Makers. The building set fire to was one of seven built in a row, and intended for dwelling-houses, and built in part of machine-made bricks. On the night of the 25th of June, 1871, the prisoners (and some others who escaped) set fire to it by means of paraffin oil. All the walls, external and internal, of the house were built and finished. The roof was on and finished. A considerable part of the flooring was laid. The internal walls and ceilings were prepared ready for plastering. The house was in a forward state towards completion, but was not completed.

At the conclusion of the case for the prosecution, it was objected by the counsel for the prisoners that the erection set fire to was not a building within the meaning of the statute, because it was not completely finished. The learned judge was against the objection, but it was stated that Lush, J., in a similar case, had expressed his intention to reserve the point for the opinion of the Court of Criminal Appeal, and, at the request of the counsel, the learned judge assented to take the same course.

The learned judge took the opinion of the jury, whether, as a question of fact, the erection was a building, and they found that it was. The prisoners were found guilty.

The questions for the opinion of the Court were :—

First: Was the question concluded by the finding of the jury?

Secondly: If it was not, was the objection made by the learned counsel for the prisoners a valid one?

No counsel appeared.

KELLY, C.B. It is to be regretted that we have not had the assistance of counsel in this case, because the point raised is both new and important. We are of opinion that the question having been properly left to the jury, their finding upon it is conclusive.

The building in question, though not completed, was intended to be a house. It was one of a row of seven houses, unfinished it is true, but in a forward state towards completion. Then the question arises whether this is a building within s. 6 of 24 & 25 Vict. c. 97, which makes it felony unlawfully and maliciously to set fire to "any building other than such as are in

1871

THE QUEEN
v.
MANNING.

1871

THE QUEEN
v.
MANNING.

this Act before mentioned." As the buildings mentioned in the earlier sections are here referred to, it may be well to see what some of those buildings are. Sect. 3 throws light upon the case. By that section: "Whosoever shall unlawfully and maliciously set fire to any house, stable, coach-house, out-house, warehouse, office, shop, mill, malthouse, hopoast, barn, storehouse, granary, hovel, shed, or fold, or to any farm building, or to any building or erection used in farming land, or in carrying on any trade or manufacture, or any branch thereof . . . shall be guilty of felony." Now the argument may be urged that these several kinds of buildings enumerated in s. 3 are all necessarily completed buildings, but that is not so. Take for example the term "office." That may form only a part of a house; and an office may be completed on the ground floor, while the house above it is not completed. So again with the term "shop." There may well be a shop on the ground floor, with floors above it for lodgings or other purposes. In such a case the office or shop, though only part of a house, could be within s. 3. There is nothing in that section to limit its operation to completed buildings. Still less is there in s. 6. The words of that section are not "any other building," but the larger words, "any building other than such as are in this Act before mentioned." I think, therefore, the ruling of the learned judge and the finding of the jury were right; this was a building fairly and substantially within the Act of Parliament. I say nothing as to what extent of partial completion in an unfinished building may be necessary to bring it within the section. I do not say that two or three yards of wall would be a building. But when a house is in the state in which this was, I think it is within the Act.

BYLES, J. I also think the conviction should be affirmed. It is not necessary to lay down a definition of what is a building. It is sufficient to say that the erection in this case was properly found to be one. Such words as those in the section must be interpreted in their ordinary sense. And it would certainly not have been a departure from ordinary language to have asked, "Who built that structure?" The judge considered it to be a building, and the jury found so; and the decision was right.

PIGOTT, B. I am of the same opinion. This was not, I think, a house, but it was a building.

1871

THE QUEEN
v.
MANNING.

LUSH, J. I am of the same opinion. A building need not necessarily be a completed structure; it is sufficient that it should be a connected and entire structure. I do not think four walls erected a foot high would be a building. And my impression is that in the case referred to, tried before me, there were only four walls unconnected, and not advanced further than a short distance towards completion.

HANNEN, J. I am of the same opinion. It is very likely that a house can only mean a structure designed and sufficiently advanced for the habitation of man. But I think the structure in the present case was a building other than a house, and therefore within s. 6.

Conviction affirmed.

THE QUEEN v. CHAMBERS.

Nov. 11.

Forgery—24 & 25 Vict. c. 98, s. 23—"Undertaking."

The prisoner, being pressed for payment of a debt, obtained further time to pay, by giving, as security, an I. O. U., purporting to be signed by himself and another, the signature of the latter being forged by the prisoner:—

Held, that the instrument was an "undertaking for the payment of money" within the meaning of 24 & 25 Vict. c. 98, s. 23.

CASE stated by Blackburn, J.

The prisoner was tried on an indictment for feloniously forging an instrument which was set out in the indictment in the words and figures following:—

"November 21st, 1870.

I. O. U. thirty-five pounds

35£. Arthur Chambers,
George Wickham."

It was described in one count as an undertaking for the payment of money, and in another as a security.

On the trial, evidence was given that the prisoner having obtained a loan of 35£., and being pressed for payment, obtained

1871

THE QUEEN
v.
CHAMBERS.

further time by giving as a security the instrument which purported to be signed by his brother-in-law, George Wickham.

It was objected that, though, if the instrument had been genuine, it might have been evidence of an account stated by Wickham, from which the law would have implied a promise on his part to pay the money; and so would in effect operate as an undertaking to pay the money, and as a security for its payment, yet it was not in itself either one or other.

The learned judge reserved the point, and left to the jury whether the instrument was forged by the prisoner with intent to defraud.

The verdict was "Guilty."

The question was, whether the instrument in question was either an undertaking or a security within the meaning of 24 & 25 Vict. c. 98, s. 23. (1)

No counsel appeared.

KELLY, C.B. The question in this case is, whether the instrument forged by the prisoner is an "undertaking for the payment of money" within the meaning of 24 & 25 Vict. c. 92, s. 23, so as to make the forgery of it an offence within that section. Now the instrument is in form an I. O. U. for thirty-five pounds, purporting to be signed by the prisoner and his brother-in-law, George Wickham. And it appears from the case that the prisoner, being pressed for repayment of a loan, obtained further time by giving this instrument as a security. I am clearly of opinion that such a

(1) Sect. 23 of 24 & 25 Vict. c. 98, enacts that: "Whosoever shall forge or alter, or shall offer, utter, dispose of, or put off, knowing the same to be forged or altered, any undertaking, warrant, order, authority, or request, for the payment of money, or for the delivery or transfer of any goods or chattels, or of any note, bill, or other security for the payment of money, or for procuring or giving credit, or any indorsement on, or assignment of, any such undertaking, warrant, order, authority, or request, or any accountable receipt, acquittance, or receipt for money

or for goods, or for any note, bill, or other security for the payment of money, or any indorsement on or assignment of any such accountable receipt, with intent, in any of the cases aforesaid, to defraud, shall be guilty of felony. . . ." It will be observed that this section does not make it an offence to forge a "security for money," but only to forge "an undertaking, &c., for the delivery, &c., of a security for money." It would appear, therefore, that the second count was not a good count under the section.

security is an undertaking for the payment of money within the meaning of the Act. It may be argued that there was no consideration for such an undertaking. But there was consideration for it. There was the giving of further time to the prisoner to pay the debt, for the payment of which he was being pressed. The instrument is therefore an undertaking for the payment of money given for sufficient consideration. If any doubt could formerly have existed, it has been removed by the Mercantile Law Amendment Act, which makes it unnecessary that the consideration for a guarantee should appear in writing.

1871

THE QUEEN
v.
CHAMBERS.

BYLES, J. I am of the same opinion.

PIGOTT, B. I think the instrument in question was an undertaking for the payment of money. It does not shew the consideration; but that is not necessary. It is a guarantee by Wickham of the prisoner's debt.

LUSH, J. I am of the same opinion. It appears that the prisoner was indebted, and being pressed for payment, obtained further time to pay by giving this instrument as a security. If Wickham had signed it, I think he would have been bound by it, for the consideration need not now appear in writing.

HANNEN, J. I am of the same opinion.

Conviction affirmed.

END OF MICHAELMAS TERM, 1871.

CASES

DETERMINED BY THE

COURT FOR CROWN CASES RESERVED

IN

HILARY TERM, XXXV VICTORIA.

1872
Jan. 20.

THE QUEEN *v.* JOSEPH NEWBOULT AND BENJAMIN
HOLDSWORTH.

Arson—Indictment—Immaterial Averment—Statement of Ownership—
24 & 25 Vict. 97, ss. 3, 60.

Two prisoners were indicted, under 24 & 25 Vict. c. 97, s. 3, for feloniously setting fire to a shop "of and belonging to" one of the prisoners:—

Held, that the averment of property in the prisoner was an immaterial averment, which need not be proved; and that an intent to injure another person as owner might be proved in support of the indictment.

CASE stated by Pigott, B.

The prisoners were tried at the last winter assizes for the West Riding of Yorkshire, holden at Leeds, on the charge of arson.

The substance of the indictment was as follows:—

First count. That Joseph Newboulton and Benjamin Holdsworth maliciously and feloniously did set fire to a shop of and belonging to the said Joseph Newboulton, and then being in the possession of the said Joseph Newboulton, with intent thereby to injure, against the form of the statute. (1)

The second count was in the same form, except that the intent laid was to defraud.

The third count stated that the said Joseph Newboulton and

(1) 24 & 25 Vict. c. 97, s. 3, enacts that "whosoever shall unlawfully and maliciously set fire to any house, stable, coach-house, outhouse, warehouse, office, shop . . . whether the same shall then be in the possession of the offender, or in the possession of any other person, with intent thereby to injure or defraud any person, shall be guilty of felony."

1872

 THE QUEEN
 v.
 NEWBOULT.

Benjamin Holdsworth unlawfully, maliciously, and feloniously did set fire to divers matters and things then being in and under a certain shop there of and belonging to the said Joseph Newbould, and then being in the possession of the said Joseph Newbould, with intent thereby and by means thereof unlawfully, maliciously, and feloniously to set fire to the said shop, and thereby to injure and defraud, and the said Joseph Newbould and Benjamin Holdsworth by the overt acts in this count mentioned unlawfully, maliciously, and feloniously did attempt to set fire to the said building in this count mentioned under such circumstances that if the same had thereby been set fire to they would have been guilty of felony against the form of the statute.

At the conclusion of the case for the prosecution it was objected on behalf of the prisoners that as no policy of insurance upon the premises was produced, there was no evidence from which the jury could infer an intent to injure the insurance office. And, secondly, that upon the counts of this indictment it was not open to the jury to convict of an intent to defraud or injure the owner of the premises, inasmuch as the premises were in the indictment alleged to be "of and belonging to Joseph Newbould" himself, and must hence be taken to be his property.

The learned judge refused to stop the case, but reserved the questions for this Court.

The prisoner Newbould was the master and Holdsworth was his servant at the shop in Leeds Road, Bradford, where a general grocery business was carried on, and where a fire occurred on the 5th of October last. The material evidence on which the counsel for the prosecution relied to shew the intent to injure or defraud was, as to the ownership of the premises, as follows:—John Hey stated that he was a trustee of the premises for the landlady, and that Joseph Newbould was under notice to leave, and should have left on the 5th of September last, and that the witness a week before the day of the fire had asked him to leave the premises, which he had not done. And as to the other objection, evidence was given that a notice to produce a policy of insurance (effected by the prisoner Newbould on his stock) was served on him, but too late to be complied with, and the learned judge held it was insufficient on that ground. The counsel then called a witness

1872
THE QUEEN
v.
NEWBOUTL.

from the insurance office, who said, "Newboulton came to me in May, 1867, about effecting an insurance, and on the 30th of August of the present year (1871) he came again, and said he wished to renew his policy in Leeds Road for 500*l.* (the same amount), and he then paid me ten shillings." The stock of goods on the premises at the time of the fire was of the value of 21*l.*

Both prisoners were found guilty.

And the learned judge asked the jury if they believed that Newboulton was tenant of the premises; and further, whether both prisoners had an intent to injure the landlady? And also whether they believed they had an intent to defraud the insurance office?

The jury answered that they found both intents.

The questions for this Court were, whether—first, there was sufficient evidence of the existence of an insurance to support the finding by the jury of an intent to defraud the office; and, secondly, whether on these counts it was competent for the jury to find that there was an intent to injure the owner of the premises.

The case was argued before Cockburn, C.J., Martin, and Channell, BB., and Keating and Lush, JJ.

Waddy, for the prisoners. There is no sufficient evidence of the existence of a policy to support the finding of an intent to defraud the company. And the indictment alleges the shop set on fire to be "of and belonging to the said Joseph Newboulton," the prisoner himself; whereas the evidence is that the house was the landlady's, and the finding is that the intent was to injure the owner. It is necessary to allege the ownership of the house: *Rickman's Case* (1); 2 Russell on Crimes, 4th ed., by Greaves, 1046.

[COCKBURN, C.J. By s. 60 of this Act, 24 & 25 Vict. c. 97, it is sufficient in any indictment for any offence under the Act, when it shall be necessary to allege an intent to injure or defraud, to allege that the party accused did the act with intent to injure or defraud (as the case may be) without alleging an intent to injure or defraud any particular person.]

That only refers to alleging the intent; it leaves the law as it was as to alleging the ownership.

[MARTIN, B. The rule referred to applied to an indictment at

common law. This is an offence against s. 3 of 24 & 25 Vict. c. 97. The averment of ownership is an immaterial averment, and might be struck out. Were it not so, there would, no doubt, be a variance.

1872

THE QUEEN
v.
NEWMBOULT.

COCKBURN, C.J. The statement of ownership was necessary at common law, because it was not arson for a man to set fire to his own house. But under the statute it is otherwise; and therefore the averment of ownership is an immaterial averment; so that there is nothing to prevent the jury under this indictment finding an intent to injure the landlady, the real owner.]

Campbell Foster, for the prosecution, was not called upon.

Conviction affirmed.

Attorneys for prosecution: *Terry & Robinson, Bradford.*

Attorney for prisoner: *Fluker, for J. W. Berry, Bradford.*

THE QUEEN v. THOMAS BAILEY.

Jan. 20.

Larceny—Process of Court—Taking with Fraudulent Purpose—24 & 25 Vict. c. 96, s. 30.

The prisoner's goods having been seized under warrants of execution of a county court, and being in the possession of the bailiff, the prisoner, with intent to deprive the bailiff, as he supposed, of his authority, and so defeat the execution, forcibly took the warrants from him:—

Held, that the prisoner was not guilty of larceny, but that he was guilty of taking the warrants for a fraudulent purpose within the meaning of 24 & 25 Vict. c. 96, s. 30.

CASE stated by Lush, J.

The prisoner was indicted at Oxford at the summer assizes 1871, under the 30th section of the Larceny Act, 24 & 25 Vict. c. 96. (1)

(1) 24 & 25 Vict. c. 96, s. 30, enacts that, "Whosoever shall steal, or shall for any fraudulent purpose take from its place of deposit for the time being, or from any person having the lawful custody thereof, or shall unlawfully and maliciously cancel, obliterate, injure, or destroy the whole, or any part of any record, writ, return, panel,

process, interrogatory, deposition, affidavit, rule, order, or warrant of attorney, or of any original document whatsoever of or belonging to any court of record, or relating to any matter, civil or criminal, begun, depending, or terminated in any such court, . . . shall be guilty of felony."

1872

THE QUEEN
v.
BAILLY.

The first count of the indictment charged the prisoner with stealing certain process of a court of record, to wit, a certain warrant of execution issued out of the county court of Berkshire, in an action wherein one Arthur was plaintiff, and the prisoner defendant; also another warrant of execution out of the same court in an action, Halcombe & Co. against the prisoner.

The second count stated that at the time of committing the offence hereinafter mentioned, one Brooker had the lawful custody of certain process of a court of record, to wit, a warrant of execution out of the county court of Berkshire in an action between Arthur and the defendant; that defendant intending to prevent the due course of law, and to deprive Arthur of the rights, benefits, and advantages from the lawful execution of the warrant, did take from Brooker the said warrant, he Brooker having then the legal custody of it.

It was proved that two actions had been brought in the county court against the prisoner, in each of which judgment had been given against him, and a warrant of execution issued against his goods. The high bailiff of the court made the levy under these warrants, and having done so, he handed the warrants over to his deputy bailiff, and left him in possession of the goods.

The prisoner, a day or two afterwards, forcibly took the warrants out of the bailiff's hands and kept them. He then ordered him away as having no authority to remain there any longer, and on his refusal to go forcibly turned him out.

The prisoner was convicted; but as the learned judge entertained a doubt whether these facts supported the count for larceny, and whether, as the prisoner's intention in taking the warrants was not to make use of them but merely to deprive the bailiff, as he supposed, of his authority, and as the validity of the execution was not affected by his taking the warrants, he was guilty of taking them for a fraudulent purpose within the meaning of the statute, he forbore to pass sentence, and admitted the prisoner to bail till the opinion of this Court should have been taken upon the above points.

No counsel appeared.

COCKBURN, C.J. I think the first count, charging larceny, will

not hold. It is clear that the prisoner took the warrants from the bailiff thinking that his authority depended on his possession of the warrants, and that by taking them away he would put an end to the authority. But this was not done *animo furandi*; it was not done *lucri causâ*. It was no more stealing than it would be to take a stick out of a man's hand to beat him with it.

Under the second count, the question is whether what was done was done with a fraudulent purpose. I think it was so. The purpose was to deprive the officer of the power to execute process, and so to defeat the execution.

MARTIN and CHANNELL, BB., and KEATING, J., concurred.

LUSH, J. I quite concur, on consideration, in the judgment of the Court. I thought at first that what the statute meant was an intention to use the documents for a fraudulent purpose.

Conviction affirmed.

THE QUEEN v. PAYNE AND OTHERS.

Jan. 27.

Evidence—Competence—Joint Indictment and Trial—One Prisoner called as Witness for Another.

Where two prisoners are indicted and tried together, one is not a competent witness for the other.

CASE stated by Keating, J.

John Payne, George Owen, Isaac Owen, and Joseph Curtis, were indicted at the winter assizes for the county of Worcester, 1871, for that they, to the number of three or more, armed with offensive weapons, by night, did enter and move on land belonging to Earl Dudley, for the purpose of taking or destroying game.

It appeared that at one o'clock on the morning of the 4th of October, 1871, the keepers of Earl Dudley discovered a number of poachers upon the earl's lands taking game. They were armed with stones, bludgeons, &c., and advanced upon the keepers, with whom they had a desperate struggle. Ultimately the keepers were forced to retire, one keeper being dangerously, and another severely wounded.

1872

THE QUEEN
v.
BAILEY.

1872
 THE QUEEN
 v.
 PAYNE.

The prisoner Payne, and the two Owens, were first apprehended, and on being brought before the magistrates, each set up an alibi by way of defence, and called witnesses in support; amongst the witnesses called by Payne was the prisoner Curtis, not then in custody, and he proved having been with Payne at the time in question at a place so distant from the scene of the affray as to render it impossible he could have been one of the poachers. Curtis, with the other witnesses for the prisoners, were bound over by the magistrates under 30 & 31 Vict. c. 35; but having been afterwards identified as one of the party of poachers, he was committed and indicted with the other three prisoners.

On the trial all four prisoners were sworn to by various witnesses as having formed part of the gang of poachers on the night in question; the defence by each was, as before the magistrates, an alibi, and the counsel for Payne proposed to call the prisoner Curtis to prove what he had deposed to before the justices. The learned judge held that he was incompetent, and could not be called. All the prisoners were convicted, and sentence passed.

The questions for the opinion of the Court were:—

First, Whether a prisoner, jointly indicted with another, can, after they have been given in charge to the jury, be called as a witness for the other, without having been either acquitted or convicted, or a nolle prosequi entered: *Winsor v. The Queen* (1), *Reg. v. Deeley*. (2)

Second, Whether upon the present form of indictment, and under the circumstances of the case, the prisoner Curtis was competent and ought to have been called as a witness for the prisoner Payne: see *Russell on Crimes*, 4th ed., by Greaves, pp. 626–7; *Taylor on Evidence*, 5th ed., pp. 1178–9.

Jan. 20. The Court (Cockburn, C.J., Martin and Channell, BB., Keating and Lush, JJ.), reserved the case for the consideration of all the judges.

Jan. 27. The case was argued before Cockburn, C.J., Kelly, C.B., Martin, Bramwell, Channell, Pigott, and Cleasby, BB., Willes,

(1) 6 B. & S. 143; 35 L. J. (M.C.) 121; S. C. in Ex. Ch.; 7 B. & S. 490;
 35 L. J. (M.C.) 161.

(2) 11 Cox, Cr. C. 607.

Byles, Keating, Blackburn, Mellor, Lush, Brett, Grove, and Quain, JJ.

1872
THE QUEEN
v.
PAYNE.

T. S. Pritchard (*Selfe* with him), for the prisoner. The reason why at common law a party to any proceeding, whether civil or criminal, was not admissible as a witness, was on the ground of interest: *Worrall v. Jones*. (1) In Phillips on Evidence, 8th ed., p. 68, it is expressly so stated as to criminal proceedings: "With regard to the competency of defendants in criminal prosecutions, it is scarcely necessary to observe, that as they are in general immediately interested in the event, it does not often happen that they can be called as witnesses." Then 6 & 7 Vict. c. 85, s. 1 (2) abolished in general terms incapacity from crime or interest, and that would have admitted the testimony of the parties to any proceeding, civil or criminal, including a prisoner under such circumstances as the present, had it not been for the proviso which excludes "any party individually named in the record." Then came 14 & 15 Vict. c. 99 (3), s. 1 of which repealed the above

(1) 7 Bing. 395.

(2) 6 & 7 Vict. c. 85, s. 1, enacts that "no person offered as a witness shall hereafter be excluded by reason of incapacity from crime or interest from giving evidence, either in person or by deposition, according to the practice of the Court, on the trial of any issue joined, or of any matter or question, or on any inquiry arising in any suit, action, or proceeding, civil or criminal, in any court, or before any judge, jury, sheriff, coroner, magistrate, officer, or person having by law, or by consent of parties, authority to hear, receive, and examine evidence; but that every person so offered may and shall be admitted to give evidence on oath, or solemn affirmation in those cases wherein affirmation is by law receivable, notwithstanding that such person may or shall have an interest in the matter in question, or in the event of the trial of any issue, matter, question, or injury [sic], or of the suit, action, or proceeding in which he is

offered as a witness, and notwithstanding that such person offered as a witness may have been previously convicted of any crime or offence: Provided that this Act shall not render competent any party to any suit, action, or proceeding individually named in the record, or any lessor of the plaintiff or tenant of premises sought to be recovered in ejectment, or the landlord or other person in whose right any defendant in replevin may make cognizance, or any person in whose immediate and individual behalf, any action may be brought or defended, either wholly or in part, or the husband or wife of such persons respectively. . ."

(3) 14 & 15 Vict. c. 99, s. 1, enacts that, "So much of s. 1 of 6 & 7 Vict. c. 85, as provides that the said Act shall not render competent any party to any suit, action, or proceeding individually named on the record, or any lessor of the plaintiff, or tenant of premises sought to be recovered in ejectment, or the landlord or other

1872

THE QUEEN
v.
PAYNE.

proviso in the earlier Act. Section 2 makes the parties to any proceeding competent witnesses, "except as hereinafter excepted." And s. 3 gives the exceptions, viz., that a person charged in any criminal proceeding shall not be a witness for or against himself, and that the husband or wife of a party charged shall not be admissible for or against the wife or husband. Therefore, the old incapacity on the ground of interest having been swept away by the earlier Act, and the excluding proviso in that Act repealed by s. 1 of the later Act, and parties expressly made competent by s. 2, the only witnesses whose testimony is excluded are those excepted in s. 3, viz., a prisoner called on his own behalf, and the husband or wife of a prisoner called for or against the wife or husband.

[BLACKBURN, J. By s. 3, a prisoner cannot give evidence for or against himself. But if a prisoner on his trial is examined, he must be cross-examined; and that can hardly be without his giving evidence against himself.

COCKBURN, C.J. Is s. 3 an exception to s. 2 at all? Must not the proceeding in s. 2 mean proceeding ejusdem generis with the

person in whose right any defendant in replevin may make cognizance, or any person in whose immediate and individual behalf any action may be brought or defended, either wholly or in part, is hereby repealed."

S. 2: "On the trial of any issue joined, or of any matter or question, or on any inquiry arising in any suit, action, or other proceeding, in any court of justice, or before any person having by law, or by consent of parties, authority to hear, receive, and examine evidence, the parties thereto, and the persons in whose behalf any such suit, action, or other proceeding may be brought or defended shall, except as hereinafter excepted, be competent and compellable to give evidence, either viva voce or by deposition, according to the practice of the Court, on behalf of either or any of the parties to the said suit, action, or other proceeding."

S. 3: "But nothing herein contained shall render any person who in any criminal proceeding is charged with the commission of any indictable offence, or any offence punishable on summary conviction, competent or compellable to give evidence for or against himself or herself, or shall render any person compellable to answer any question tending to criminate himself or herself, or shall in any criminal proceeding render any husband competent or compellable to give evidence for or against his wife, or any wife competent or compellable to give evidence for or against her husband."

S. 4: "Nothing herein contained shall apply to any action, suit, proceeding, or bill, in any court of common law, or in any ecclesiastical court, or in either house of parliament, instituted in consequence of adultery, or to any action for breach of promise of marriage."

suit or action specifically mentioned? And if so, can the section apply to criminal proceedings at all? The words "civil or criminal," used in the older Act, are omitted in this section.]

1872
THE QUEEN
v.
PAYNE.

Section 2 expressly refers to s. 3 by the words, "except as hereinafter excepted."

[BRAMWELL, B. Those words may well apply to s. 4, which excepts proceedings founded upon adultery, and for breach of promise of marriage.

LUSH, J. Section 3 speaks also of the case of the husband or wife of a person accused; and that cannot be an exception to s. 2, for s. 2 would not apply to the case.]

There is authority for the admissibility of this evidence. In *Reg. v. Deeley* (1), Mellor, J., admitted similar evidence. And that ruling has been followed by Pigott, B., in *Reg. v. Parry and Allman* (2), and by Lush, J.

[KEATING, J., referred to *Reg. v. Stevenson and Coulter*, before Ball, J., at the Armagh Spring Assizes, 1851, cited 3 Russell on Crimes, 4th ed., by Greaves, 627, n.]

The law is so laid down in 2 Taylor on Evidence, 5th ed. 1179: "If, therefore, several persons be jointly indicted, any one of them may, under s. 2, be called as a witness either for or against his confederates, excepting only in those few cases where the indictment is so framed as to give him a direct interest in obtaining their discharge," such as those in which the offence can only be committed by a certain number of persons; and the writer treats *Reg. v. Jackson* (3), to the contrary effect, as overruled. And this passage is cited without disapproval in 3 Russell on Crimes, 4th ed. by Greaves, p. 625. Upon the analogous question, as to the admissibility of the evidence of the wife of one prisoner as a witness for another tried jointly with him, there has been some conflict of authority; but the later cases are in favour of its admissibility. In *Rex v. Smith* (4) such evidence was held inadmissible by all the judges except Graham, B., and Littledale, J. But in *Reg. v. Moore* (5), though *Rex v. Smith* (4) was cited, Maule, J., admitted such evidence. And in *Reg. v. Bartlett* (6), Wightman, J., after

(1) 11 Cox, Cr. C. 607.

(2) Not reported.

(3) 6 Cox, Cr. C. 525.

(4) 1 Moo. Cr. C. 269.

(5) 1 Cox, Cr. C. 59.

(6) 1 Cox, Cr. C. 105.

1872
 THE QUEEN
 v.
 PAYNE.

consulting Cresswell, J., took the same course. In the present case it appears that the prisoner whom it was proposed to call had actually been examined before the magistrates; and he had been bound over to appear and give evidence under 30 & 31 Vict. c. 35, s. 3. It cannot have been intended that a prisoner should be deprived of the benefit of that section by the witness being subsequently included in the indictment.

[COCKBURN, C.J. The remedy for that is to apply to have the prisoners tried separately. And if the witness were improperly included in the indictment, the judge would, no doubt, grant such an application.]

The fact of the proposed witness having been given in charge to the jury does not affect the case. There is no giving in charge in misdemeanour; and in felony its only effect is to identify the prisoner whom the jury have to try.

[BLACKBURN, J. It is much more than that. It fixes irrevocably that the particular jury to whom he is given in charge is the one to decide his guilt or innocence. Can it be that the jury which has to do this may first hear him examined and cross-examined?]

In *Winsor v. The Queen* (1) the witness was jointly indicted with the prisoner, and had been given in charge, and no verdict had been taken as to her, nor a nolle prosequi entered. But it was the opinion of all the judges that her evidence was properly received. (2)

[BLACKBURN, J. The witness was a party to the record; but had not been given in charge to the same jury.]

It is true that in that case Cockburn, C.J., says (3), that "in all cases where persons are jointly indicted, and it is thought necessary to have the evidence of one against the other, it is better, in order to insure the greatest amount of truthfulness of the testimony, that a verdict of not guilty should be taken, or, if the circumstances admit of it, a plea of guilty should be taken, and sentence passed." But that is only a suggestion of convenience, not a binding rule.

[COCKBURN, C.J. A notion has gone abroad that I laid down

(1) 6 B. & S. 143; 35 L. J. (M.C.) 121; S. C. in Ex. Ch. 7 B. & S. 490; 35 L. J. (M.C.) 161. (2) 7 B. & S. at pp. 494, 503. (3) 6 B. & S. at p. 178.

that one of these courses must be taken. That is very different from what I did say ; I only spoke of what is convenient.]

1872

THE QUEEN
v.
PAYNE.

F. T. Streeten (*Jelf* with him), for the prosecution. The common law principle is correctly stated in *Hawkesworth v. Showler* (1), by Lord Abinger, C.B., viz., that a party to the record, and affected by the issue, was incompetent. And the statutes cited have not altered it in the case of a prisoner on his trial. The first Act, 3 & 4 Wm. 4, c. 42, s. 26, was limited to actions. 6 & 7 Vict. c. 85, s. 1, applied to criminal proceedings as well, so far as to remove the incapacity from crime or interest. But the proviso excluding parties does not mention criminal proceedings. This shews that the person jointly indicted with another was not excluded on the ground merely of interest.

[BLACKBURN, J. What interest can one person be said to have in getting off another ?

BRETT, J. Is not the true ground the broad one that no one on his trial for a criminal offence can be examined or cross-examined, because no one is bound to criminate himself ?]

14 & 15 Vict. c. 99, s. 2, does not apply to criminal cases at all ; and s. 3 is only introduced *ex majore cautela*. It was introduced in the House of Lords against Lord Campbell's protest. But even if that section did apply, still by s. 3 a man cannot give evidence for or against himself ; and if he is put in the witness-box while on his trial there is no drawing the line, and he must give evidence against himself. The cases to the contrary which have been cited are mere rulings at the assizes, and cannot weigh with this Court against clear principles ; and the rule cited from *Taylor on Evidence* is not law.

Pritchard, in reply, referred to *Reg. v. Stewart*. (2)

COCKBURN, C.J. We are all of opinion that the evidence rejected was properly rejected. We are all agreed that the exception in 14 & 15 Vict. c. 99, s. 3, was introduced to prevent any possibility of its being thought that the law as it had existed from the earliest times was altered by the Act. By that law it was a distinguishing characteristic of our criminal system that a prisoner on his trial could neither be examined nor cross-examined. We

(1) 12 M. & W. 45, at p. 47.

(2) 1 Cox, Cr. C. 174.

1872
 THE QUEEN
 v.
 PAYNE.

think it is impossible to suppose that it could have been intended to change this rule by a mere sidewind by means of this exception.

Conviction affirmed.

Attorney for prosecution: *R. Saunders, Jun., Kidderminster.*

Attorney for the prisoner: *Miller Corbett, Kidderminster.*

Jan. 30.

THE QUEEN v. SAMUEL SMITH WARD.

Wounding—Indictment for Felony—24 & 25 Vict. c. 100, s. 18—Conviction for Misdemeanour—14 & 15 Vict. c. 19, s. 5—Malice—Intent to Frighten—Evidence.

The prosecutor and prisoner were out at night in separate punts, on a creek, in pursuit of wild fowl. The prisoner, who was jealous of any one going there to shoot, and had threatened to fire at birds notwithstanding other persons might be between him and them, discharged his gun from a distance of twenty-five yards towards the punt in which the prosecutor lay paddling. At that moment the prosecutor's punt slewed round, and the prosecutor was struck by some of the shot and seriously wounded, whereupon the prisoner rendered him help, assuring him that the injury was an accidental result of the slewing round of the punt. The night was light and the boat visible fifty yards off. No birds were in view. The two men had always been on good terms, and the gun was fired apparently with the intention of frightening the prosecutor away rather than that of hurting him. The prisoner was indicted for the felony of wounding with intent to do grievous bodily harm; but the jury, under 14 & 15 Vict. c. 19, s. 5, found him guilty of the misdemeanour of unlawfully wounding:—

Held, that "unlawful wounding" within the meaning of that section must be "malicious;" and that there was proof of malice, which justified the conviction of the prisoner.

CASE stated by Cockburn, C.J.

The prisoner was tried before me at the last assizes for the county of Suffolk, on a charge of unlawfully, maliciously, and feloniously wounding one William Job Chatten, with intent to do him grievous bodily harm.

The prosecutor, Chatten, and the prisoner were both fishermen, living at Aldebury, in Suffolk, and both were in the habit of going out in punts to shoot wild fowl, in a creek of the River Alde.

The manner of using a punt for the purpose of shooting wild fowl is that the gunner lies with his face downwards in the boat, extending his arms over the sides, and propelling the boat by

means of a pair of short paddles, so as to avoid, as much as possible, being seen by the birds on the water.

1872

THE QUEEN
v.
WARD.

On the evening of the 30th of January, 1871, the prosecutor, Chatten, was on the water in his punt, in pursuit of wild fowl. Having been out some time, and finding no birds about, he determined to return, and having put his arm out was using the paddle to slew the punt round for that purpose, when he suddenly heard the report of a gun, and at the same time found himself struck by several shots in the left arm and eye, the effect of which was seriously to injure his arm, and so to damage his eye as to render its total extraction necessary a few days after.

There was no doubt that the shot by which the prosecutor was injured was fired by the prisoner. On the prosecutor calling out on being struck, and asking who had fired the shot, the prisoner, who was in his punt, about twenty-five yards off, came forward, and said he had fired it, adding that, if Chatten had not turned his boat round as he, prisoner, was in the act of firing, the shot would not have struck him. This being so, the question in the case was under what circumstances and with what intention prisoner had fired off the gun.

It was proved that the night was light, so that birds and, a fortiori, a punt on the water could have been plainly seen at a distance of fifty to sixty yards; and it was positively sworn by the prosecutor that there were no birds about on that evening, certainly none in the neighbourhood of his boat. It was plain, therefore, that the prisoner had not fired for the purpose of killing wild fowl. Evidence was given from which it appeared that the prisoner was extremely jealous of persons going in pursuit of wild fowl on the water where the event took place, and had on different occasions used threatening language to the effect that he should shoot at birds if occasion offered, notwithstanding other persons might be between him and them; and it was suggested by the prosecution that the prisoner had intentionally shot at the prosecutor with the intent to injure him, and thereby to prevent him pursuing wild fowl on the water in question in future.

On the other hand it appeared that the prosecutor and the prisoner had always been on good terms, having formerly been shipmates on board the same pilot vessel. It was admitted by the

1872
THE QUEEN
v.
WARD.

prosecutor that, on his calling out, the prisoner at once came forward, and ascribed the fact of the shot having taken effect to the sudden change of the position of the prosecutor's boat—a change of position which was an admitted fact—and assured the prosecutor that the result was purely accidental. It appeared that the prisoner had towed the prosecutor's punt into the harbour, and rendered him every assistance in getting on shore. The prisoner received an excellent character for good conduct and humanity.

Under these circumstances it seemed to be more probable that the prisoner shot off his gun in the direction of the prosecutor's boat, with the intention of frightening him, and so deterring him from again coming into the creek for the purpose of fowling, rather than that he shot with the intent of doing him bodily harm. While, therefore, the learned judge left the question of the intent charged in the indictment to the jury, he directed them that, if they took the more favourable view of the case, they should find the prisoner guilty of unlawfully wounding. This they accordingly did; but thinking it deserving of consideration whether a wounding occasioned by an act done without any actual malice or intention of offering violence to the prosecutor, would be sufficient to constitute an "unlawful wounding" within the meaning of the statute 24 & 25 Vict. c. 100, s. 20, the learned judge reserved that question for the consideration of this Court, and requested their judgment thereupon.

1871. Nov. 18. The Court (Kelly, C.B., Byles, Lush, and Hannen, JJ., and Pigott, B.) reserved the case for the consideration of all the judges.

Jan. 30. The case was argued before Cockburn, C.J., Kelly, C.B., Martin, Channell, Bramwell, Pigott, and Cleasby, BB., Willes, Byles, Blackburn, Mellor, Lush, Brett, Grove, and Quain, JJ.

[COCKBURN, C.J. The statement of the statute in this case is wrong, the question before us really arises on s. 5 of 14 & 15 Vict. c. 19. (1)]

(1) 14 & 15 Vict. c. 19, s. 5, enacts that "if upon the trial of any indictment for any felony, except murder or manslaughter, where the indictment

shall allege that the defendant did cut, stab, or wound any person, the jury shall be satisfied that the defendant is guilty of the cutting, stabbing, or

Metcalf, for the prisoner. The indictment is under 24 & 25 Vict. c. 100, s. 18, which provides for the felony of wounding with intent to do grievous bodily harm. Section 20, enacting that whosoever shall unlawfully and maliciously wound or inflict any grievous bodily harm upon any other person shall be guilty of a misdemeanour, takes the place of the repealed 4th section of 14 & 15 Vict. c. 19. But s. 5 of the last-mentioned statute is still in operation.

1872

THE QUEEN
v.
WARD.

[COCKBURN, C.J. And, strange to say, was omitted from the Consolidated Act, 24 & 25 Vict. c. 100.]

It enables the jury trying a prisoner upon an indictment for felonious wounding to acquit him of the felony, and find him guilty of the misdemeanour of unlawful wounding only. But if they do so they must find him guilty of unlawfully and *maliciously* wounding, although the word maliciously is not in s. 5.

[COCKBURN, C.J. The wounding stated in the indictment *minus* the intent there charged?]

Yes; the offence provided for by s. 4 of the same Act or the equivalent section of the recent statute. Secondly. Malice is essential, either actual or such as the law would imply. There must be an unlawful act done with intention to assault. If a man fired *at* another even from so great a distance that the shot would not reach him, still there would be an intention to hit him. But the prisoner did not aim at the prosecutor.

[MARTIN, B. Is not careless firing which causes a wound sufficient?]

It is not; and were death to ensue the person wounding would

wounding, charged in such indictment, but are not satisfied that the defendant is guilty of the felony charged in such indictment, then and in every such case the jury may acquit the defendant of such felony, and find him guilty of unlawfully cutting, stabbing, or wounding, and thereupon such defendant shall be liable to be punished in the same manner as if he had been convicted upon an indictment for the misdemeanour of cutting, stabbing, or wounding."

24 & 25 Vict. c. 100, s. 18, enacts that "whosoever shall unlawfully and maliciously wound any person with intent to do grievous bodily harm, shall be guilty of felony."

Sect. 20 enacts that "whosoever shall unlawfully and maliciously wound or inflict any grievous bodily harm upon any other person, either with or without any weapon or instrument, shall be guilty of a misdemeanour. . ."

1872
THE QUEEN
v.
WARD.

be guilty of manslaughter, but not of murder, because he had no malice. The question is whether "maliciously" means "intentionally." Suppose one to fire from his own land across a highway and to shoot a passer-by: although it is unlawful to fire on the highway, yet could it be said that the injury to the person was a malicious wounding? Or again, if a bonfire were made near a public road, which would be an illegal act, and the flame, blown by the wind, ignited a haystack, could the offender be convicted under 24 & 25 Vict. c. 97 of unlawfully and maliciously setting fire to the hay?

BLACKBURN, J., referred to *Reg. v. Child*. (1)]

The jury have found no intent to injure. "Malice in its legal sense denotes a wrongful act done intentionally without just cause or excuse," per Littledale, J., in *McPherson v. Daniels*. (2)

[BLACKBURN, J. I have always thought a man acts maliciously when he wilfully does that which he knows will injure another in person or property.]

It will suffice for the present argument to treat the word "maliciously" as synonymous with "intentionally:" *Reg. v. Noon* (3); *Reg. v. Sparrow*. (4) Some meaning and effect must be given to the word.

[MELLOR, J. Was there not *malus animus* in the prisoner who intended to frighten the prosecutor away?]

He had no evil mind *to wound*.

[COCKBURN, C.J. When a man does an act malicious of itself, but without intending larger consequences, are not the limited results sufficient to make him responsible for all? To support an indictment for murder it is enough to prove that the act causing death was done maliciously, and it is not necessary to shew an intention *to kill*.]

Then if this act of which the prisoner has been convicted had caused death, his offence would have been murder. Firing a gun to frighten was unlawful, but the wound not having been given intentionally the act was not malicious, and therefore not within the terms of the statute.

[MELLOR, J. In the introduction to the Discourse of Homicide

(1) Law Rep. 1 Cr. C. 307.

(2) 10 B. & C. at p. 272.

(3) 6 Cox, Cr. C. 137.

(4) Bell, Cr. C. 298.

by Foster, p. 257, we read that the legislature has frequently used the terms malice and maliciously in a general sense, "as denoting a wicked, perverse, and incorrigible disposition."]

1872
THE QUEEN
v.
WARD.

No counsel appeared for the prosecution.

COCKBURN, C.J. We have considered this case, and are all agreed that in construing s. 5 of 14 & 15 Vict. c. 19 we should read that section as though the term *malicious* had been introduced, and that it is an essential element in a conviction under that section that the act which caused the unlawful wounding should have been done maliciously as well as unlawfully. With respect to whether the facts of the present case as stated amount to proof of the necessary malice or not, the Court has been divided, twelve out of fifteen judges being of opinion that there was proof of malice. The conviction must, therefore, be affirmed.

Conviction affirmed.

Attorney for prisoner : *Storey, for Chamberlain, Yarmouth.*

END OF HILARY TERM, 1872.

CASES

DETERMINED BY THE

COURT FOR CROWN CASES RESERVED

IN

EASTER TERM, XXXV VICTORIA.

1872]

April 27.

THE QUEEN v. REEVE AND HANCOCK.

Evidence—Confession—Admissibility.

The prisoners, two children, one aged eight and the other a little older, were tried for attempting to obstruct a railway train. It was proved that, the mothers of the prisoners and a policeman being present, after they had been apprehended, the mother of one of the prisoners said: "You had better, as good boys, tell the truth;" whereupon both the prisoners confessed:—

Held, that this confession was admissible in evidence against the prisoners.

CASE stated by Byles, J.

The prisoners were children. One was eight years of age and the other a little older. They were convicted at the Worcester Assizes of an attempt to commit a misdemeanour by obstructing a railway train.

The evidence was, that Hancock's mother, Reeve's mother, and a policeman being present, after they had been apprehended on suspicion, Mrs. Hancock said, "You had better, as good boys, tell the truth;" whereupon both the prisoners confessed, and on this confession were both convicted.

The question for the opinion of the Court was, whether the confession was admissible against both the prisoners, or either.

No counsel appeared for the prisoners.

F. T. Streeken, for the prosecution, cited *Reg. v. Jarvis*. (1) He was stopped by the Court.

(1) *Ante*, p. 96.

KELLY, C.B. We need not hear you further. The cases had no doubt at one time gone a great deal too far in the exclusion of such evidence as that now in question. But the case cited is binding upon us; and it is a much stronger case than the present.

1872

 THE QUEEN
v.
REWE.

WILLES, J. I am of the same opinion. It seems to have been supposed, at one time, that saying "Tell the truth" meant, in effect, "Tell a lie."

CLEASBY, B., GROVE, and QUAIN, JJ., concurred.

Conviction affirmed.

Attorneys for prosecution: *Young, Maples, & Co.*

THE QUEEN v. WILLIS.

May 4.

*Penal Servitude—Previous Conviction of Felony not charged in Indictment—
27 & 28 Vict. c. 47, s. 2.*

By 27 & 28 Vict. c. 47, s. 2, "Where any person shall on indictment be convicted of any crime or offence punishable with penal servitude, after having been previously convicted of felony, the least sentence of penal servitude that can be awarded in such case shall be a period of seven years."

The prisoner was convicted of a crime punishable with penal servitude, and it was proved that he had been previously convicted of felony; but the previous conviction was not stated in the indictment:—

Held, that the above section did not apply.

CASE stated by Bramwell, B.

This case was tried at the last assizes for the city of Exeter. It was an indictment for wounding with intent to do grievous bodily harm, and the prisoner was found guilty of unlawfully wounding. It was proved, though not stated in the indictment, that he had been before convicted of felony. Indeed he had been three times so convicted, and sentenced on each occasion to long periods of transportation. The case was a very bad one, and the learned judge sentenced him to seven years' penal servitude, which was not more than an adequate sentence. If he sentenced him to penal servitude, and had power to do so for more than five years,

1872
 THE QUEEN
 v.
 WILLIS.

he was bound to sentence him for seven. (1) If he had not such power, the sentence should not have exceeded five years. On this the learned judge desired the opinion of the Court, and according to that the sentence was to stand or be reduced to five years.

Cur. adv. vult.

April 27. No counsel appeared.

May 4. The judgment of the Court (Kelly, C.B., Willes, Grove, and Quain, JJ., and Cleasby, B.) was delivered by

KELLY, C.B. In this case we are of opinion that, inasmuch as the previous conviction was not mentioned in the indictment, the statute requiring a minimum sentence of seven years' penal servitude did not apply. Consequently, to the question whether the judge was bound to pass a sentence of seven years' penal servitude, we must answer that he was not so bound. The prisoner was entitled to have his identity tried by a jury, which could not be, as the previous conviction was not upon the record. The case of *Reg. v. Summers* (2) is an authority to this effect. In thus giving effect to the sentence of five years' penal servitude instead of seven, we give effect to the learned judge's sentence, and are not passing a sentence of our own.

The judgment will be amended into a sentence of five years, pursuant to the statute 11 & 12 Vict. c. 78, s. 2.

Sentence amended accordingly.

(1) By 27 & 28 Vict. c. 47, s. 2, " . . . Where any person shall on indictment be convicted of any crime or offence punishable with penal servitude, after having been previously con-

victed of felony, . . . the least sentence of penal servitude that can be awarded in such a case shall be a period of seven years."

(2) Ante, p. 182.

THE QUEEN v. EDWARD REA.

1872

May 4.

Bigamy—Marriage before Registrar—Misnomer—6 & 7 Wm. 4, c. 85, ss. 4, 42.

The prisoner, having a wife living, was married to another woman in the presence of the registrar, describing himself not as E. R., his true name, but as B. R. There was no evidence to shew that the second wife knew that his Christian name was misdescribed :—

Held, that the prisoner was guilty of bigamy.

CASE stated by Byles, J.

The prisoner was indicted at Shrewsbury Assizes for bigamy.

He was married in 1866, by the name of Edward Rea, to his first wife, now living, who refused to cohabit with him, and told him he might go and marry any other woman. In 1872 he, accordingly, married another woman in the presence of the registrar, describing himself not as Edward Rea, his true name, but as Benjamin Rea.

There was no evidence to shew whether the second wife, at the time of her marriage, knew or did not know that his Christian name was misdescribed.

He was convicted of bigamy, subject to the opinion of this Court whether on these facts the felony was proved.

April 27. No counsel appeared.

Cur. adv. vult.

May 4. The judgment of the Court (Kelly, C.B., Willes, Grove, and Quain, JJ., and Cleasby, B.) was delivered by

KELLY, C.B. This case must be decided upon the same principles which applied to the case of marrying by banns, because the language of the statute for marriage before a registrar, 6 & 7 Wm. 4, c. 85, ss. 4, 42, follows the provisions as to banns, and ought to receive the same construction.

As to banns, it is clear that, to render a marriage invalid, it must be contracted with a knowledge by both parties that no true publication of banns had taken place: *Rex v. Wroxtton* (1); *Tongue v. Tongue*. (2) In this case the man only appears to have known of

(1) 4 B. & Ad. 640,

(2) 1 Moo. P. C. 90.

1872 the misnomer ; and the presumptions in favour of marriage clearly
THE QUEEN throw the burden of proof of invalidity upon the party alleging
v. it. This was assumed in *Tongue v. Tongue* (1) ; otherwise the state-
REA. ment of Parke, B.'s dissent would have been superfluous. There-
fore, without saying that if both parties knew of the misnomer
there would have been no offence against the statute of bigamy (2),
the conviction ought to be affirmed.

Conviction affirmed.

(1) 1 Moo. P. C. 90.

(2) See *Reg. v. Allen*, post, p. 367.

END OF EASTER TERM, 1872.

CASES

DETERMINED BY THE

COURT FOR CROWN CASES RESERVED

IN

TRINITY TERM, XXXV VICTORIA.

THE QUEEN v. HENRY ALLEN.

1872

Bigamy—Second Marriage invalid independently of the First—24 & 25 Vict. May 23.
c. 100, s. 57.

Where a person, already bound by an existing marriage, goes through with another person a form of marriage known to and recognized by the law as capable of producing a valid marriage, for the purpose of a pretended and fictitious marriage, such person is guilty of bigamy, notwithstanding any special circumstances which, independently of the bigamous character of the marriage, may constitute a legal disability in the parties, or make the form of marriage resorted to inapplicable to their case.

The prisoner, having a wife living, went through the ceremony of marriage with another woman, who was within the prohibited degrees of affinity; so that the second marriage, even if not bigamous, would have been void under 5 & 6 Wm. 4, c. 54, s. 2:—

Held, that the prisoner was guilty of bigamy.

Reg. v. Funning (17 Ir. C. L. 289; 10 Cox Cr. C. 411) disapproved.

CASE stated by Martin, B.

Indictment for bigamy.

At the trial before Martin, B., at the Manchester Spring Assizes, 1872, it was proved that on the 24th of February, 1853, the prisoner married one Sarah Cunningham. She died in August, 1866, leaving a niece named Harriet Crouch. On the 30th of November, 1867, he married one Ann Pearson Gutteridge, and on the 2nd of December, 1871, and in the lifetime of Ann Pearson Gutteridge, he married the above-named Harriet Crouch.

1872

THE QUEEN
v.
ALLEN.

It was objected by the learned counsel for the prisoner that the marriage with Harriet Crouch, his first wife's niece, was void, and that the crime of bigamy was not committed. It was stated that the Court of Criminal Appeal in Ireland had so decided, and in deference to this decision, at the request of the prisoner's counsel, the learned Judge stated this case.

The question for the Court was, whether the prisoner was guilty of bigamy. (1)

April 27. THE COURT (Kelly, C.B., Willes, Grove, and Quain, JJ., and Cleasby, B.) reserved the case for the consideration of all the Judges.

May 4. The case was argued before Cockburn, C.J., Bovill, C.J., Kelly, C.B.; Martin, Bramwell, Channell, Pigott, and Cleasby, B.B.; Willes, Byles, Blackburn, Mellor, Lush, Hannen, Grove, and Quain, JJ.

; *E. U. Bullen* appeared for the prisoner.

Warry for the prosecution.

The following authorities were cited:—*Reg. v. Fanning* (2); *Reg. v. Braun* (3); *Burt v. Burt* (4); *Reg. v. Millis* (5); *Reg. v. Allison* (6); 1 Russell on Crimes, 4th ed. by Greaves, p. 307.

Cur. adv. vult.

May 23. The judgment of the Court was delivered by Cockburn, C.J.:—

This case came before us on a point reserved by Martin, B., at the last assizes for the county of Hants. The prisoner was indicted for having married one Harriet Crouch, his first wife being still alive. The indictment was framed upon the statute 24 & 25 Vict. c. 100, s. 57, which enacts that "whosoever being married

(1) By 24 & 25 Vict. c. 100, s. 57: "Whosoever, being married, shall marry any other person during the life of the former husband or wife . . . shall be guilty of felony."

By 5 & 6 Wm. 4, c. 54, s. 2: "All marriages between persons within the prohibited degrees of consanguinity or

affinity shall be absolutely null and void to all intents and purposes whatsoever."

(2) 17 Ir. C. L. 289; 10 Cox Cr. C. 411.

(3) 1 C. & K. 144.

(4) 2 Sw. & Tr. 88; 29 L. J. (P. M. & A.) 133.

(5) 10 Cl. & F. at p. 689,

(6) R. & R. C. C. 109,

shall marry any other person during the life of the former husband or wife shall be guilty of felony." The facts of the case were clear. The prisoner had first married one Sarah Cunningham, and on her death he had married his present wife, Ann Parson Gutteridge. The second wife being still living, he, on the 2nd of December, 1871, married one Harriet Crouch. So far the case would appear to be clearly one of bigamy within the statute; but, it appearing that Harriet Crouch was a niece of the prisoner's first wife, it was objected, on his behalf, that since the passing of 5 & 6 Wm. 4, c. 54, s. 2, such a marriage was in itself void, and that to constitute an offence, within 24 & 25 Vict. c. 100, s. 57, the second marriage must be one which, independently of its bigamous character, would be valid, and, consequently, that the indictment could not be sustained. For the proposition that, to support an indictment for bigamy, the second marriage must be one which would have been otherwise valid, the case of *Reg. v. Fanning* (1), decided in the Court of Criminal Appeal in Ireland, was cited, and, in deference to the authority of the majority of the judges in that Court, Martin, B., has stated this case for our decision.

It is clear that, but for the statutory inability of the parties to marry one another if free, the marriage of the prisoner with Harriet Crouch would have been within the 57th section of the Act. The question is, whether that circumstance alters the effect of the prisoner's conduct in going through the ceremony of marriage with Harriet Crouch while his former wife was still living. The same question arose in the case of *Reg. v. Braun* (2), which was tried before Lord Denman on the earlier statute of 9 Geo. 4, c. 31, s. 22, the language of which was precisely the same as that of the present. In that case the prisoner, a married woman, had, during her husband's lifetime, married a man who had been the husband of her deceased sister. The same point as is now raised being taken on behalf of the prisoner, Lord Denman overruled the objection. "I am of opinion," said his Lordship, "that the validity of the second marriage does not affect the question. It is the appearing to contract a second marriage, and the going through the ceremony, which constitutes the crime of bigamy; otherwise it could never exist in the ordinary cases, as

(1) 17 Ir. C. L. 289; 10 Cox, Cr. C. 411.

(2) 1 C. & K. 144.

1872
 THE QUEEN
 v.
 ALLEN.

a previous marriage always renders null and void a marriage that is celebrated afterwards by either of the parties during the lifetime of the other. Whether, therefore, the marriage of the two prisoners"—the male prisoner had been included in the indictment as an accessory—"was or was not in itself prohibited, and therefore null and void, does not signify; for the woman, having a husband then alive, has committed the crime of bigamy by doing all that in her lay by entering into marriage with another man." In the earlier and analogous case of *Reg. v. Penson* (1), a similar objection had been taken, on the ground that the second marriage was invalid, by reason that the woman whom the prisoner was charged with having married whilst his first wife was alive, had, for the purpose of concealing her identity, been described as Eliza Thick, her true name being Eliza Brown. But Gurney, B., who tried the case, overruled the objection, being of opinion "that the parties could not be allowed to evade the punishment for such an offence by contracting a *concertedly* invalid marriage."

We should have acted without hesitation on these authorities had it not been for the case, already referred to, of *Reg. v. Fanning* (2), decided in the Court of Criminal Appeal in Ireland, a case which, if not on all fours with the present, is still closely analogous to it, and which, from the high authority of the Court by which it was decided, was entitled to our most attentive consideration. We therefore took time to consider our judgment.

The facts in *Reg. v. Fanning* (2) were shortly these. The prisoner, being a Protestant, and having within twelve months been a professing Protestant, was married, having a wife then living, to another woman, who was a Roman Catholic, the marriage being solemnized by a Roman Catholic priest. ;

Independently of the second marriage being bad as bigamous, it would have been void under the unrepealed statute of the 19 Geo. 2, c. 13, which prohibits the solemnization of marriage by a Roman Catholic priest where either of the parties is a Protestant, and declares a marriage so solemnized null and void to all intents and purposes.

On an indictment against the prisoner for bigamy, the invalidity of the second marriage was insisted on as fatal to the prosecution.

(1) 5 C. & P. 412.

(2) 17 Ir. C. L. 289; 10 Cox, Cr. C. 411.

The point having been reserved, seven judges against four in the Court of Criminal Appeal held the objection to be fatal, and quashed the conviction. After giving our best consideration to the reasoning of the learned judges who constituted the majority of that Court, we find ourselves unable to concur with them, being unanimously of opinion that the view taken by the four dissentient judges was the right one.

1872

THE QUEEN
v.
ALLEN.

The reasoning of the majority of the Court in *Reg. v. Fanning* (1) is founded mainly on the verbal criticism of the language of the 24 & 25 Vict. c. 100, s. 57; and the words being that "if any person, being married, shall marry any other person," it was insisted that whatever sense is to be given to the term "being married," the same must be given to the term "marry" in the subsequent part of the sentence, and that consequently, it being admitted that the term "being married" implies a perfect and binding marriage, the second marriage must also be one which, but for the prohibition of the statute, would be—whether as regards capacity to contract marriage or the manner in which the marriage is solemnized—binding on the parties.

Two authorities were relied on in support of this reading of the statute, namely, the language of Tindal, C.J., in delivering the opinion of the judges in the House of Lords in the well-known case of *Reg. v. Millis* (2), and the decision of the Judge Ordinary of the Divorce Court in the case of *Burt v. Burt*. (3) In the first of these cases Tindal, C.J., undoubtedly says that the words "being married" in the first part of the sentence, and the words "marry any other person," in the second, must of necessity point at and denote "marriage of the same kind and obligation." But it must be borne in mind that the question before the House of Lords was, whether the first marriage, not the second, was valid, the invalidity of the second not being in question at all. In order to shew that the first marriage, which had been solemnized by a Presbyterian minister, at his own house, between a member of the Established Church in Ireland and a Presbyterian, amounted to no more than a contract per verba de præsenti, and had failed to constitute a

(1) 17 Ir. C. L. 289; 10 Cox, Cr. C. 411.

(2) 10 Cl. & F. at p. 689.

(3) 2 Sw. & Tr. 88; 29 L. J. (P. M. & A.) 133.

1872

THE QUEEN
v.
ALLYN.

valid marriage, the Chief Justice of the Common Pleas insists that, if such a marriage had occurred in the second instance instead of the first, it would not have been held sufficient to support an indictment for bigamy. The case put by the Chief Justice was not the point to be decided; it was only used for the purpose of argument and illustration. Whether the incapacity of the parties to contract a binding marriage independently of the bigamy would take a case like that of *Reg. v. Fanning* (1) out of the statute, was not present to his mind or involved in the decision of the case before the House. And the Chief Justice expressly states that, though the conclusion he had arrived at was concurred in by the rest of the judges, his reasoning was entirely his own. The language of the learned Chief Justice must therefore be taken as extra-judicial, and cannot bind us in expounding the statute now under consideration. The case of *Burt v. Burt* (2), in like manner, falls altogether short of the question we have now to decide. It was a suit for a divorce instituted by a married woman against her husband on the ground of bigamy, adultery, and desertion. To establish the bigamy, evidence was given that the husband had married a woman in Australia according to the form of the Kirk of Scotland, but there was no proof that the form in question was recognized as legal by the local law. Upon this latter ground the Judge Ordinary held that a second marriage was not proved so as to make good the allegation of bigamy. All, therefore, that this case shews is, that a second marriage by a form not recognized by law will not amount to bigamy under the Divorce Act. Admitting, as we are disposed to do, that the construction of the two statutes should be the same, the decision in *Burt v. Burt* (2) will not, as will presently appear, be found to conflict with our judgment in the present case, the second marriage having here been celebrated according to a form fully recognized by the law.

We may, therefore, proceed to consider what is the proper construction of the statutory enactment in question, unfettered by these authorities. Before doing so it should, however, be observed, that there is this difference between the case of *Reg. v. Fanning* (1) and the present, that the form of marriage there resorted to was

(1) 17 Ir. C. L. 269; 10 Cox, Cr. C. 411.

(2) 2 Sw. & Tr. 188; 29 L. J. (P. M. & A.) 133.

one which, independently of the bigamous character of the marriage, was, by reason of the statutory prohibition, inapplicable to the special circumstances of the parties, and ineffectual to create a valid marriage, whereas, in the case before us, independently of the incapacity, the form would have been good and binding in law. This distinction is expressly adverted to by Christian, J., in his judgment as distinguishing the case before the Irish judges from that of *Reg. v. Brawn* (1), and it may be doubted whether, but for this distinction, the learned judge would not have come to a different conclusion. The other judges, constituting the majority, do not, however, rest their judgment on this distinction, but plainly go the length of overruling the decision of Lord Denman in *Reg. v. Brawn*. (1) Their judgments proceed on the broad intelligible ground, that to come within the statutes against bigamy the second marriage must be such as that, but for its bigamous character, it would have been in all respects, both as to the capacity of the parties and the ceremonial adopted, as binding as the first. Differing altogether from this view, and being prepared to hold that, so long as a form of marriage has been used which the law recognizes as binding, whether applicable to the particular parties or not—and further than this it is not necessary to go—the offence of bigamy is committed, we have only adverted to the distinction referred to in order to point out that our decision in no degree turns upon it, but rests on the broader ground taken by the dissentient judges in the Irish court.

When it is said that, in construing the statute in question, the same effect must be given to the term “marry” in both parts of the sentence, and that, consequently, as the first marriage must necessarily be a perfect and binding one, the second must be of equal efficacy in order to constitute bigamy, it is at once self-evident that the proposition as thus stated cannot possibly hold good; for if the first marriage be good, the second, entered into while the first is subsisting, must of necessity be bad. It becomes necessary, therefore, to engraft a qualification on the proposition just stated, and to read the words “shall marry,” in the latter part of the sentence, as meaning “shall marry” under such circumstances as that the second marriage would be good but for the

(1) 1 C. & K. 144.

1872

THE QUEEN
v.

1872

THE QUEEN
v.
AILEX.

existence of the first. But it is plain that those who so read the statute are introducing into it words which are not to be found in it, and are obviously departing from the sense in which the term "being married" must be construed in the earlier part of the sentence. But when once it becomes necessary to seek the meaning of a term occurring in a statute, the true rule of construction appears to us to be, not to limit the latitude of departure so as to adhere to the nearest possible approximation to the ordinary meaning of the term, or to the sense in which it may have been used before, but to look to the purpose of the enactment, the mischief to be prevented, and the remedy which the legislature intended to apply. Now, we cannot agree either with Fitzgerald, B., in his judgment in *Reg. v. Fanning* (1), that the purpose of the statutes against bigamy was simply to make polygamous marriages penal, and that, consequently, it was only intended to constitute the offence of bigamy where the second marriage would, but for the existence of the first, be a valid one; or with those judges who, in *Reg. v. Fanning* (1), found their judgments on the assumption that, in applying the statute against bigamy, the second marriage must be one which, but for the first, would be binding. Polygamy, in the sense of having two wives or two husbands, at one and the same time, for the purpose of cohabitation, is a thing altogether foreign to our ideas, and which may be said to be practically unknown; while bigamy, in the modern acceptation of the term, namely, that of a second marriage consequent on an abandonment of the first while the latter still subsists, is unfortunately of too frequent occurrence. It takes place, as we all know, more frequently where one of the married parties has deserted the other; sometimes where both have voluntarily separated. It is always resorted to by one of the parties in fraud of the law; sometimes by both, in order to give the colour and pretence of marriage where the reality does not exist. Too often it is resorted to for the purpose of villainous fraud. The ground on which such a marriage is very properly made penal is, that it involves an outrage on public decency and morals, and creates a public scandal by the prostitution of a solemn ceremony, which the law allows to be applied only to a legitimate union, to a marriage

(1) 17 Ir. C. L. 289; 10 Cox, Cr. C. 411.

at best but colourable and fictitious, and which may be made, and too often is made, the means of the most cruel and wicked deception. It is obvious that the outrage and scandal involved in such a proceeding will not be less, because the parties to the second marriage may be under some special incapacity to contract marriage. The deception will not be the less atrocious, because the one party may have induced the other to go through a form of marriage known to be generally binding, but inapplicable to their particular case. Is the scandal or the villany the less because the man, having represented to the woman, who is his dupe, and to the priest, that he is a Roman Catholic, turns out afterwards to be a Protestant? Such instances as those we have referred to, thus involving public scandal or deception, being plainly within the mischief which we may reasonably assume it must have been the purpose of the legislature to prevent, we are of opinion that we ought not to frustrate the operation of a very salutary statute, by putting so narrow a construction on it as would exclude such a case as the present, if the words are legitimately capable of such a construction as would embrace it. Now the words "shall marry another person" may well be taken to mean shall "go through the form and ceremony of marriage with another person." The words are fully capable of being so construed, without being forced or strained; and as a narrower construction would have the effect of leaving a portion of the mischief untouched, which it must have been the intention of the legislature to provide against, and thereby, as is fully admitted by those who contend for it, of bringing a grave reproach on the law, we think we are warranted in inferring that the words were used in the sense we have referred to, and that we shall best give effect to the legislative intention by holding such a case as the present to be within their meaning. To assume that the words must have such a construction as would exclude it, because the second marriage must be one which, but for the bigamy, would have been as binding as the first, appears to us to be begging the entire question, and to be running directly counter to the wholesome canon of construction, which prescribes that, where the language will admit of it, a statutory enactment shall be so construed as to make the remedy co-extensive with the mischief it is intended to prevent.

1872

THE QUEEN
v.
ALLEN.

1872
THE QUEEN
v.
ALLEN.

In thus holding it is not at all necessary to say that forms of marriage unknown to the law, as was the case in *Burt v. Burt* (1), would suffice to bring a case within the operation of the statute. We must not be understood to mean that every fantastic form of marriage to which parties might think proper to resort, or that a marriage ceremony performed by an unauthorized person, or in an unauthorized place, would be a marrying within the meaning of the 57th section of 24 & 25 Vict. c. 100. It will be time enough to deal with a case of this description when it arises. It is sufficient for the present purpose to hold, as we do, that where a person already bound by an existing marriage goes through a form of marriage known to and recognized by the law as capable of producing a valid marriage, for the purpose of a pretended and fictitious marriage, the case is not the less within the statute by reason of any special circumstances, which, independently of the bigamous character of the marriage, may constitute a legal disability in the particular parties, or make the form of marriage resorted to specially inapplicable to their individual case.

After giving the case of *Reg. v. Fanning* (2) our best consideration, we are unanimous in holding that the conviction in the case before us was right, and that the verdict must stand good.

Conviction affirmed.

Attorneys for prosecution: *Lamb & Son, Andover.*

Attorneys for prisoner: *Footner & Son, Andover.*

(1) 2 Sw. & Tr. 88; 29 L. J. (P. M. & A.) 133.

(2) 17 Ir. C. L. 289; 10 Cox, Cr. C. 411.

THE QUEEN v. JAMES THOMPSON, WILLIAM DANZEY, AND
ABRAHAM HIDE.

1872
June 1.

*Evidence—Competence—Joint Indictment and Trial—Wife of One Prisoner
called as Witness for Another.*

Where two prisoners are indicted and tried together, the wife of one is not a competent witness for the other.

CASE stated by the chairman of quarter sessions for the county of Essex.

This was a joint indictment, tried at the Easter quarter sessions for the county of Essex, against Thompson and Danzey, for stealing fifty-six pounds of onions, the property of their master, and against Hide for receiving the same, knowing them to be stolen.

The charge was that the two first, being sent with two carts of vegetables to Covent Garden, stopped on the road at Hide's house, and there disposed to him of this bag of onions, stolen by the two conjointly from one of the carts.

The prisoners did not ask to be tried separately, but the two first retained one counsel and Hide retained another.

The case depended mainly on what had been done and said at the door of Hide's house, and in his kitchen, by Thompson, Danzey, Hide, and his wife Elizabeth, and a maid servant Eliza, sister of the prisoner Thompson. After the speech of the counsel for Thompson and Danzey, he tendered as a witness for his clients Elizabeth, the wife of the prisoner Hide.

This was objected to by counsel for the prosecution, on the ground that her evidence must directly affect the case against her husband, inasmuch as the acquittal of the two would necessarily entail the acquittal of Hide, and, moreover, that anything tending to strengthen or weaken the evidence against them must have a similar effect on the evidence as regarded Hide.

The following cases were referred to:—*Reg. v. Smith* (1); *Reg. v. Moore* (2); *Reg. v. Bartlett* (3); *Reg. v. Deeley* (4); *Reg. v. Payne*. (5)

(1) 1 Moo. C. C. 289.

(2) 1 Cox, Cr. C. 59.

(3) 1 Cox, Cr. C. 105.

(4) 11 Cox. Cr. C. 607.

(5) Ante, p. 349.

1872

THE QUEEN
v.
THOMPSON.

Under these circumstances, and considering the general policy of the law as rejecting the evidence of a wife for or against her husband in criminal cases; the Court refused to admit the evidence of the wife, subject to a case to be submitted to the Court for Crown Cases Reserved.

Thompson and Danzey were convicted and Hide was acquitted.
No counsel appeared.

BOVILL, C.J. We have considered the point in this case reserved for our decision, and we are of opinion that the wife of any one of the three prisoners stands in the same position with respect to the admissibility of her evidence as her husband. The three prisoners were all indicted in one indictment, though there were counts charging different offences; and being indicted together, and tried together, and in charge of the jury, one of them could not be called as a witness for the others. This was so decided in *Reg. v. Payne* (1) in January last. And as the wife stands in the same position as the husband, the present case cannot be distinguished from that.

BYLES, BLACKBURN, and MELLOR, JJ., and BRAMWELL, B., concurred.

Conviction affirmed.

June 8.

THE QUEEN v. HENRY MARTIN AND WILLIAM WEBB.

View—Mistrial—Evidence heard by Jury out of Court—Practice—Jurisdiction.

It is no irregularity to allow the jury to have a view of premises after the judge has summed up the case.

Where it is alleged that the jury have received evidence in the absence of the judge and of the prisoners, it is for the Court, before which the trial takes place, to investigate the facts, and ascertain whether the alleged irregularity has occurred.

Quere, whether, if such irregularity be so found to have occurred, this Court has jurisdiction to order a venire de novo, as for a mistrial.

CASE stated by the Deputy-Assistant Judge for the Middlesex Sessions.

(1) *Ante*, p. 349.

The prisoners were indicted at the quarter sessions for the the county of Middlesex, held on the 6th of May, 1872, 1st, for indecent exposure in a public place; and 2nd, for inciting each other to sodomy.

1872

THE QUEEN
v.
MARTIN.

The case for the prosecution was proved by two policemen, John Tunbridge and Thomas Hunt. At 6 o'clock in the evening of the 23rd of April, Tunbridge was on duty in St. James' Park. He saw the prisoner Webb (who was well known to him as a frequenter of urinals) lurking about one of the urinals in the park, and going in and out of it repeatedly. His suspicions being roused, he hid himself and watched. Soon afterwards he saw the prisoner Martin go in, upon which he crept up behind the urinal, and looking through the bars in the back of the wall he saw the prisoners in the act of exposing and handling the private parts of each other. He beckoned to Hunt, who came to the spot, and witnessed the same proceeding on the part of the prisoners.

The defence was, that from the position in which the witnesses stood, and that in which the prisoners were described as standing, it was impossible for the witnesses looking through the bars of the urinal to have seen so far down the persons of the prisoners as to have beheld the filthy act and exposure which they had described.

The prisoner Martin was defended by counsel.

The prisoner Webb was undefended.

After I had summed up the case, and while the jury were deliberating, they put some further questions to the witnesses as to their respective positions, and then the jury stated that it was very difficult to come to a decision without viewing the urinal and ascertaining by personal inspection if the witnesses could have seen what they had asserted, and they asked permission to view the locus in quo. Martin's counsel had then left the court. No objection to compliance with this request of the jury was made by either of the prisoners or on their behalf.

In the absence of Martin's counsel I requested that his solicitor would accompany the jury on the view, and he also being absent, the view was attended by the solicitor's clerk. The jury inspected the urinal, and there, as I am informed, asked the witnesses to point out the precise spot in which they had stood, and the place and the position in which the prisoners were standing, and then

1872
 THE QUEEN
 v.
 MARTIN.

the jury placed themselves in the same position and looked through the bars.

On the return of the jury to the court the counsel for the prisoner Martin had left the court, but the solicitor or the clerk who had attended the view, or both, were present. No application was made by either of the prisoners, or on behalf of either of them, to be allowed to make any further comments to the jury on the proceedings at the view. I asked the jury if they required any further observations or information from me. On their answering in the negative, I directed them to retire and consider their verdict. After a short consultation they found both the prisoners guilty, and they were sentenced severally to nine months' imprisonment with hard labour.

The counsel for the prisoner Martin has applied for a case for the opinion of this honourable Court, on the ground that there had been mistrial: 1st, by reason of the view having been permitted to the jury after the summing up by the judge; and, 2nd, by reason of the jury having at such view put some questions to the witnesses which were not heard by the judge or by the prisoners, and upon which the undefended prisoner and the counsel for the defended prisoner had not been expressly called upon to comment to the jury.

The question for the opinion of this honourable Court is,

Whether, under the circumstances above stated, there has been a mistrial. If it be the opinion of the Court that there has been a mistrial, then that a venire de novo should issue, or such other judgment be given as the Court may determine.

No counsel appeared for the prisoner.

Harris, for the prosecution, cited *Rex v. Hatchley Fradgelly* (1); *Witham v. Lewis* (2); *Reg. v. Yeadon* (3); *Gray v. Reg.* (4); *Rex v. Day* (5); 13 East, 416, note (b); 2 Tidd's Practice, p. 905, 9th ed.

BOVILL, C.J. The first objection made to the conviction in this case is, that the jury were permitted to view the urinal, in which the offence was alleged to have been committed, after the summing

(1) 1 Sess. Ca. 180.

(2) 1 Wils. 48.

(4) 11 Cl. & F. 427,

(3) Leigh & Cave, C. C. 81; 31 L. J

(M.C.) 70.

(5) Sayer, 202.

up of the learned judge. We are unanimously of opinion that there was no irregularity in allowing such a view. It is always entirely in the discretion of the Court to allow a view or not; though such precautions, as may seem to the Court necessary, ought to be taken to secure that the jury shall not improperly receive evidence out of court.

As to the second point, the alleged reception of evidence by the jury in the absence of the judge and of the prisoners, it does not appear that any examination into the facts was made in the court below. And in the absence of such examination, it is impossible for this Court to reverse the conviction, on the ground of a mere statement of what the learned judge was informed, which may be a mere rumour without any foundation.

If such an examination into the facts had been made in the court below, and it had been found that the irregularity alleged had taken place, a very serious question would then have arisen, whether a venire de novo could have been awarded on the ground of mistrial, or whether the only remedy would have been by an application to the Crown through the Secretary of State. Upon this view the case of *Reg. v. Murphy* (1) would have had an important bearing upon the question. It would also have been necessary carefully to examine all the authorities; two of which, *Vicary v. Farthing* (2) and *Graves v. Short* (3), do not appear to have been cited in *Reg. v. Murphy*. (1)

A further serious question would have arisen, whether, if the facts were thus tried and found to be as alleged, they ought to be entered on the record so as to give an opportunity of taking advantage of the defect by writ of error, or whether the question could properly be raised by a case stated for this Court. And upon this point the case of *Reg. v. Mellor* (4) would have a material bearing. But, upon the case as it stands, we have no alternative but to affirm the conviction.

Our decision does not prevent the prisoner from having recourse to a writ of error if such a writ will lie under the circumstances. Nor does it prevent an application to the Secretary of State. But

(1) Law Rep. 2 P. C. 535.

(2) Cro. Eliz. 411.

(3) Cro. Eliz. 616.

(4) Dears & B. C. C. 468; 27 L. J.

(M.C.) 121.

1872

THE QUEEN
v.
MARTIN.

if the case came before the Court of Queen's Bench upon writ of error as it is stated before us, that Court could only deal with the case in the same way as we do; for, as is pointed out by Popham, C.J., in *Groves v. Short* (1), the examination into the facts can only take place in the court below.

BYLES, BLACKBURN, MELLOR, JJ., and BRAMWELL, B., concurred.

Conviction affirmed.

Attorneys for prosecution: *Allen & Son.*

(1) Cro. Eliz. 616.

END OF TRINITY TERM, 1872.

INDEX.

ABANDONMENT OF INFANT—*Child under Two Years, whereby its Life is Endangered*—24 & 25 Vict. c. 100, s. 27—*Duty of Father.*] A woman who was living apart from her husband, and who had the actual custody of their child, under two years of age, brought the child, on the 19th of October, and left it at the father's door, telling him she had done so. He knowingly allowed it to remain lying outside his door, and subsequently in the roadway, from about 7 P.M. till 1 A.M., when it was removed by a constable, the child then being cold and stiff:—*Held*, that though the father had not had the actual custody and possession of the child, yet, as he was by law bound to provide for it, his allowing it to remain where he did was an abandonment and exposure of the child by him, whereby its life was endangered, within the meaning of 24 & 25 Vict. c. 100, s. 27. *THE QUEEN v. WHITE* - - - 311

2. — *Evidence*—24 & 25 Vict. c. 100, s. 27.] A. and B. were indicted under s. 27 of 24 & 25 Vict. c. 100, for that they "did abandon and expose a certain child then being under the age of two years, whereby the life of the said child was endangered."—A., the mother of a child five weeks old, and B., put the child into a hamper, wrapped up in a shawl and packed with shavings and cotton wool, and A., with the connivance of B., took the hamper to M., about four or five miles off, to the booking office of the railway station there. She there paid for the carriage of the hamper, and told the clerk to be very careful of it, and to send it to G. by the next train, which would leave M. in ten minutes from that time. She said nothing as to the contents of the hamper, which was addressed, "Mr. Carr's, Northoutgate, Gisbro., with care, to be delivered immediately," at which address the father of the child was then living. The hamper was carried by the ordinary passenger train from M. to G., leaving M. at 7.45 P.M., and arriving at G. at 8.15 P.M. At 8.40 P.M. the hamper was delivered at its address. The child died, three weeks afterwards, from causes not attributable to the conduct of the prisoners.—On proof of these facts at the trial, it was objected for the prisoners that there was no evidence to go to the jury that the life of the child was endangered, and that there was no abandonment and no exposure of the child within the meaning of the statute. The objections were overruled, and the prisoners found guilty:—

VOL. I.—C. C. R.

ABANDONMENT OF INFANT—*continued.*

Held, by the majority of the fifteen judges, that the conviction should be affirmed. *THE QUEEN v. FALKINGHAM* - - - 223

ABDUCTION—*Taking Girl under Sixteen out of Possession of her Father*—24 & 25 Vict. c. 100, s. 55.] 24 & 25 Vict. c. 100, s. 55, enacts that "whosoever shall take an unmarried girl, under the age of sixteen, out of the possession and against the will of her father or mother, or of any other person having the lawful care and charge of her, shall be guilty of a misdemeanour."—A. met a girl in the street going to school, and induced her to go with him to a town some miles distant, where he seduced her. They returned together, and he left her where he met her. The girl then went to her home, where she lived with her father and mother, having been absent some hours longer than would have been the case if she had not met A. A. made no inquiry, and did not know who the girl was, or whether she had a father or mother living or not, but he had no reason to and did not believe that she was a girl of the town:—*Held*, that A. was not guilty of having unlawfully taken the girl out of the possession of her father under s. 55 of 24 & 25 Vict. c. 100. *THE QUEEN v. HIBBERT* - - - 184

ABSENCE DURING SEVEN YEARS - 1
See PRESUMPTION OF DEATH. 1.

ABSENCE FOR LESS THAN SEVEN YEARS 196
See PRESUMPTION OF DEATH. 2.

ABSTRACTION OF GAS—Larceny—Continuous taking - - - 172
See LARCENY. 3.

ACCESSORY—What sufficient to render a person party to a felony - - - 77
See FELONY.

"ACQUITTANCE OR RECEIPT"—Forgery 217
See FORGERY. 1.

ADMIRALTY COURT JURISDICTION—*Man-slaughter—International Law—Merchant Shipping Act, 1854 (17 & 18 Vict. c. 104), s. 267.*] The Admiralty jurisdiction of England extends over British vessels, not only when they are sailing on the high seas, but also when they are in the rivers of a foreign territory at a place below bridges, where the tide ebbs and flows, and where great ships go.—All seamen, whatever their nationality,

ADMIRALTY COURT JURISDICTION—continued.

serving on board British vessels, are amenable to the provisions of British law.—An American citizen, serving on board a British ship, caused the death of another American citizen, serving on board the same ship, under circumstances amounting to manslaughter, the ship at the time being in the river Garonne, within French territory, at a place below bridges where the tide ebbed and flowed and great ships went:—*Held*, that the ship was within the Admiralty jurisdiction, and that the prisoner was rightly tried and convicted at the Central Criminal Court.—*Quere*, as to the effect of the Merchant Shipping Act (17 & 18 Vict. c. 104), s. 267. **THE QUEEN v. ANDERSON** 161

AFFIDAVIT OF BANKER—How sworn - 65
See **PERJURY**. 1.

AFFIDAVIT WITH BILL OF SALE—17 & 18 Vict. c. 36—Perjury—False Oath—Misdemeanour at Common Law—Practice.] A. was indicted for perjury in an affidavit made under the Bills of Sale Act for the purpose of getting a bill of sale filed. The indictment was in the ordinary form. The affidavit was sworn before a commissioner for taking affidavits in the Court of Queen's Bench. A. was found guilty:—*Held*, that A.'s offence did not constitute perjury, but that nevertheless the conviction should be affirmed, because A. was guilty of taking a false oath, which offence was sufficiently charged in the indictment, and was under the circumstances a common law misdemeanour, to the punishment for which he might be sentenced. **THE QUEEN v. HODGKISS** - 312

AGREEMENT TO COMMIT CIVIL WRONG 274
See **CONSPIRACY**.

AIDING AND ABETTING—Attempt—Practice
See **ATTEMPT TO COMMIT CRIME**. [221

AMENDMENT OF INDICTMENT—14 & 15 Vict. c. 100, s. 1—Information—Game—9 Geo. 4, c. 69, s. 1.] The judge has power, under the 14 & 15 Vict. c. 100, s. 1, to amend an indictment for perjury, describing the justices before whom the perjury was committed as justices for a county, where they are proved to be justices for a borough only. An information, under the 9 Geo. 4, c. 69, s. 1, for entering land for the purpose of taking game, is sufficient to give the justices before whom it is laid jurisdiction to hear the charge, although it does not allege that the entry was for the purpose of taking game there. **THE QUEEN v. WESTERN** - - - 122

ANIMALS FERÆ NATURE—Larceny 158, 315
See **LARCENY**. 1, 2.

ANTEDATED DEED—Forgery - - - 200
See **FORGERY**. 2.

APPRENTICE—Perjury - - - 49
See **PERJURY**. 5.

ARREST—Assault—Resistance.] The prisoner assaulted a police constable in the execution of his duty. The constable went for assistance, and after an interval of an hour returned with three other constables, when he found that the prisoner had retired into his house, the door of which was closed and fastened; after another interval of fifteen minutes the constables forced open the door, entered, and arrested the prisoner, who wounded one of them in resisting his apprehension:—*Held*, that, as there was no danger of any

ARREST—continued.

renewal of the original assault, and as the facts of the case did not constitute a fresh pursuit, the arrest was illegal. **THE QUEEN v. MARDEN** 131

2. — *Resistance—11 & 12 Vict. c. 43, schedule (O. 1).]* A magistrate's warrant of commitment upon a conviction for a penalty, following the form given in the 11 & 12 Vict. c. 43, schedule (O. 1), and addressed "to the constable of" A., can only be executed by the parish constable, and not by a county police constable stationed at A. **THE QUEEN v. SANDERS** - - - 75

ARSON—Indictment—Averment of ownership
See **MALICIOUS INJURY**. 2. [344

— *Malicious injury* - - - 307, 338
See **MALICIOUS INJURY**. 1, 4.

ASSAULT—Arrest—Resistance - 75, 131
See **ARREST**. 1, 2.

— *Effect of conviction for assault when person assaulted ultimately dies* - - - 90
See **AUTREFOIS CONVICT**.

— *Pleading—Conviction* - - - 242
See **CRIMINAL ASSAULT**.

— *Practice—Indictment* - - - 194
See **UNLAWFUL WOUNDING**. 1.

ASSISTANT OVERSEER—Embezzlement - 29
See **EMBEZZLEMENT**. 1.

ATTEMPT AT RAPE—Evidence—Contradiction
See **CONTRADICTION OF WITNESS**. [334

ATTEMPT TO COMMIT CRIME—Indictment for Felony—Aiding and Abetting—Conviction for an Attempt—14 & 15 Vict. c. 100, s. 9.] An indictment charged H. with rape, and W. with aiding and abetting in the rape. The jury found H. and W. guilty of misdemeanour; H. of attempting to commit a rape, and W. of aiding H. in the attempt.—It was contended that this verdict amounted to an acquittal of W., as the case did not fall within s. 9 of 14 & 15 Vict. c. 100, by which a person indicted for a crime may be found guilty of an attempt to commit the crime.—The objection was overruled:—*Held*, that the conviction should be affirmed. **THE QUEEN v. HAPGOOD** [221

ATTEMPT TO HAVE CARNAL KNOWLEDGE—Consent—Attempt to have carnal Knowledge of a Girl under the Age of 10.] The offence of attempting to have carnal knowledge of a girl under the age of ten years may be committed, notwithstanding the girl consents to the acts done. **THE QUEEN v. FREDERICK BEALE** - 10

AUCTION—Taking—Payment under fear - 205
See **LARCENY**. 9.

AUTHORITY—Master and servant—Larceny
See **LARCENY**. 5, 6. [150, 295

— *Payment of money—Forgery* - - - 257
See **FORGERY**. 4.

AUTREFOIS CONVICT—Assault—24 & 25 Vict. c. 100, s. 45.] A conviction for assault by justices in petty sessions, at the instance of the person assaulted, and imprisonment consequent thereon, are not, either at common law or under the 24 & 25 Vict. c. 100, s. 45, a bar to an indictment for manslaughter of the person assaulted, should he subsequently die from the effects of the assault (Kelly, C.B., dissenting). **THE QUEEN v. MORRIS** [90

AVERMENT—Jurisdiction—Perjury - 290
See PERJURY. 2.

BANKER'S AFFIDAVIT, HOW SWORN - 65
See PERJURY. 1.

BANK NOTES, FORGERY OF - 133
See FORGERY. 3.

BANKRUPT—*Feme Covert*—Husband and Wife—Evidence—12 & 13 Vict. c. 106, s. 233.] A married woman having been adjudicated a bankrupt upon her own petition, in which she described herself as a widow, was afterwards convicted under the 24 & 25 Vict. c. 134, s. 221, of having embezzled her property:—*Held*, that the conviction was wrong, as the property was her husband's. *Held*, also, by Kelly, C.B., Martin, B., and Shee, J., that examinations taken before a commissioner in bankruptcy are admissible as evidence against the persons examined upon a criminal charge. *THE QUEEN v. ROBINSON* - 80

BASTARDY SUMMONS—Jurisdiction 119, 320
See PERJURY. 3, 4.

BIGAMY—*Marriage before Registrar*—*Misnomer*—6 & 7 Wm. 4, c. 85, ss. 4, 42.] The prisoner, having a wife living, was married to another woman in the presence of the registrar, describing himself not as E. R., his true name, but as B. R. There was no evidence to shew that the second wife knew that his Christian name was misdescribed:—*Held*, that the prisoner was guilty of bigamy. *THE QUEEN v. EDWARD REA* - 365

2. — *Second Marriage invalid independently of the first*—24 & 25 Vict. c. 100, s. 57.] Where a person, already bound by an existing marriage, goes through with another person a form of marriage known to and recognized by the law as capable of producing a valid marriage, for the purpose of a pretended and fictitious marriage, such person is guilty of bigamy, notwithstanding any special circumstances which, independently of the bigamous character of the marriage, may constitute a legal disability in the parties, or make the form of marriage resorted to inapplicable to their case.—The prisoner, having a wife living, went through the ceremony of marriage with another woman, who was within the prohibited degrees of affinity; so that the second marriage, even if not bigamous, would have been void under 5 & 6 Wm. 4, c. 54, s. 2:—*Held*, that the prisoner was guilty of bigamy.—*Reg. v. Fanning* (17 Ir. C. L. 289; 10 Cox, Cr. C. 411) disapproved. *THE QUEEN v. HENRY ALLEN* - 367

3. — Absence for seven years - 1, 196
See PRESUMPTION OF DEATH. 1, 2.

BILLS OF SALE ACT, 17 & 18 Vict. c. 36—
Affidavit—Perjury - 212
See AFFIDAVIT WITH BILL OF SALE.

BIRTH—Concealment—Evidence - 244
See CONCEALMENT OF BIRTH.

BRIDGE, REPAIR OF—*Repair by Hundred*—*Highway Act, 1835* (5 & 6 Wm. 4, c. 50), s. 5—*Construction*—"Highways"—"County Bridge"—"Hundred Bridge." The Highway Act, 1835, provides for the repair of highways in a specified manner not at the expense of the hundreds. By s. 5, "highways," in the construction of the statute, "shall be understood to mean all roads, bridges (except county bridges), carriageways,

BRIDGE, REPAIR OF—*continued*.

cartways," &c., &c.:—*Held*, that "county bridges" includes hundred bridges, and consequently that hundred bridges are not highways under the Highway Act, 1835, and therefore that hundreds are not relieved by that Act from liability to repair hundred bridges.—*Semble*, that even if hundred bridges were not included in "county bridges," hundreds would not be relieved by the Highway Act, 1835, from their liability to repair hundred bridges, as there are no negative words in the statute to relieve hundreds from that liability. *THE QUEEN v. THE UPPER HALF HUNDRED OF CHART AND LONGBRIDGE* - 237

"BUILDING" - 336
See MALICIOUS INJURY. 1.

BURDEN OF PROOF—Receiving stolen goods—*Habitual Criminals Act* - 272
See RECEIVING STOLEN GOODS. 2.

CARNAL KNOWLEDGE—Attempt - 10
See ATTEMPT TO HAVE CARNAL KNOWLEDGE.

CASES—*Reg. v. Bryan* (Dears. & B. Cr. C. 263) distinguished - 301
See FALSE PRETENCES.

— *Reg. v. Cory* (10 Cox, Cr. C. 23) followed
See LARCENY. 2. [158]

— *Reg. v. Fanning* (17 Ir. C. L. 289; 10 Cox, Cr. C. 411) disapproved - 367
See BIGAMY. 2.

— *Reg. v. Goodwin* (10 Cox, Cr. C. 534) overruled - 214
See PREVIOUS CONVICTION. 3.

— *Reg. v. Orchard* (3 Cox, Cr. C. 248) observed upon - 282
See NUISANCE.

— *Reg. v. Richards* (4 F. & F. 860) overruled
See DEPOSITION BEFORE JUSTICE. 225

— *Reg. v. Thurborn* (1 Den. Cr. C. 387; 18 L. J. (M.O.) 140) observed upon, but followed - 139
See LARCENY. 8.

CATTLE—Wounding - 115
See MALICIOUS INJURY. 5.

CERTIFICATE OF PREVIOUS CONVICTION 24
See PREVIOUS CONVICTION. 4.

CHEQUE—Embezzlement - 113
See EMBEZZLEMENT. 2.

CHILD—Secret disposition of dead body - 244
See CONCEALMENT OF BIRTH.

CIVIL WRONG, AGREEMENT TO COMMIT 274
See CONSPIRACY.

CLERK OR SERVANT—Embezzlement
See EMBEZZLEMENT. 1, 3, 4. [39, 41, 177]

COIN—Proof of previous conviction - 214
See PREVIOUS CONVICTION. 3.

COINING—*Having possession of Coining Tools*—*Lawful Authority or Excuse*—24 & 25 Vict. c. 99, s. 24—*Felony*—*Guilty Intent*.] 24 & 25 Vict. c. 99, s. 24, enacts, that "whosoever without lawful authority or excuse (the proof whereof shall lie on the party accused), shall knowingly make or mend, or begin or proceed to make or mend, or buy, or sell, or have in his custody or possession," any die impressed with the re-

COINING—continued.

semblance of either side of any current coin, shall be guilty of felony.—Indictment under this section that the prisoner “knowingly and without lawful excuse feloniously” had in his possession dies impressed with the resemblance of the sides of a sovereign.—The prisoner ordered dies, impressed with the resemblance of the sides of a sovereign, of the maker. The maker gave information to the police, who communicated with the authorities of the Mint. The latter authorities, through the police, gave the maker permission to give them to the prisoner. He did so, and they were found in the prisoner’s possession:—*Held*, first, that it was necessary in the indictment to negative lawful authority or excuse, notwithstanding that the burden of proof lay upon the accused; secondly, that the word “excuse” includes “authority,” and therefore the indictment was good; thirdly, that there was no evidence to go to the jury of lawful authority or excuse; fourthly, [that the prisoner being knowingly in possession of the dies, had a sufficient guilty knowledge to constitute felony, whatever his intention as to their use might be. *THE QUEEN v. HARVEY* - - - - - 284

COINING TOOLS—Possession of - - - 284
See **COINING**.

COMMISSION—Corrupt practices at elections—
Perjury—Evidence - - - 248
See **STATEMENT BEFORE ELECTION COMMISSIONERS**.

COMMON ASSAULT—Criminal assault - 241
See **CRIMINAL ASSAULT**.

COMPETENCE OF WITNESS—Evidence—*Joint Indictment and Trial*—*One Prisoner called as Witness for Another.*] Where two prisoners are indicted and tried together, one is not a competent witness for the other. *THE QUEEN v. PAYNE* - - - - - 349

2. — *Joint Indictment and Trial*—*Wife of One Prisoner called as Witness for Another.*] Where two prisoners are indicted and tried together, the wife of one is not a competent witness for the other. *THE QUEEN v. JAMES THOMPSON, WILLIAM DANZEY, AND ABRAHAM HIDE* - 377

3. — *Incompetency—Withdrawal of Evidence from Jury.*] The evidence of an incompetent witness may be withdrawn from the jury upon the incompetency appearing during his examination-in-chief, although he has been examined previously on the *voir dire* and pronounced to be competent. *THE QUEEN v. WHITEHEAD* 33

CONCEALMENT OF BIRTH—Evidence—24 & 25 Vict. c. 100, s. 60—“*Secret Disposition of Dead Body of Child.*”] Indictment for endeavouring to conceal the birth of a child by secretly disposing of the dead body thereof. S. 60 of 24 & 25 Vict. c. 100, enacts that “if any woman shall be delivered of a child, every person who shall by any secret disposition of the dead body of the child, . . . endeavour to conceal the birth thereof, shall be guilty of a misdemeanour . . .” The prisoner put the dead body of her child over a wall 4½ feet high, which divided a yard from a field. The yard was at the back of a public

CONCEALMENT OF BIRTH—continued.

house, and was used by the occupiers of that and three other houses. There was no thoroughfare into or through the yard, and no entrance into it except by a narrow passage from the street. The prisoner did not live in any of the four houses that had the use of the yard, and she must have passed from the street into the yard in order to throw the body over the wall. A person looking over the wall from the yard would see the body, but persons going through the yard, or using it in the ordinary way, would not see the body. The field was a grass-field used by a butcher for grazing. The field had no gate except from the butcher’s yard, and there was no public path through the field, nor any path in the field that would take any one within sight of the body. Persons going into the field in their ordinary occupation, would not go near the body or see it, nor would they see it unless they went up to the part of the wall where the body lay. The body was found by chance by a child. There was nothing on or over the body, and nothing to conceal it except its situation:—*Held*, that there was evidence to go to the jury of a “secret disposition” of the body under s. 60 of 24 & 25 Vict. c. 100. *THE QUEEN v. BROWN* - - - 244

CONFESSION—Evidence—*Admissibility.*] The prisoner was called up by his master, and told: “You are in the presence of two police officers; and I should advise you that to any question that may be put to you you will answer truthfully, so that, if you have committed a fault, you may not add to it by stating what is untrue.” The master afterwards added: “Take care; we know more than you think.” The prisoner thereupon made a statement:—*Held*, that such statement was admissible against him on his trial for larceny. *THE QUEEN v. JARVIS* - - - 96

2. — *Evidence—Admissibility.*] The prisoners, two children, one aged eight and the other a little older, were tried for attempting to obstruct a railway train. It was proved that, the mother of the prisoners and a policeman being present, after they had been apprehended, the mother of one of the prisoners said: “You had better, as good boys, tell the truth;” whereupon both the prisoners confessed:—*Held*, that this confession was admissible in evidence against the prisoners. *THE QUEEN v. REEVE AND HANCOCK* 363

CONSENT—Fraud—Rape - - - 156
See **RAPE**. 1.

— Girl under ten—Carnal knowledge - 10
See **ATTEMPT TO HAVE CARNAL KNOWLEDGE**.

— Idiot—Rape - - - 39
See **RAPE**. 2.

CONSPIRACY—*Agreement to commit Civil Wrong*—*Fraud on Partner in taking Accounts on Dissolution of Partnership.*] A fraudulent agreement by a member of a partnership with third persons, wrongfully to deprive his partner by false entries and by false documents of all interest in some of the partnership property on taking accounts for the division of the property on the dissolution of the partnership, is a conspiracy, although the offence was completed before the passing of 31 &

CONSPIRACY—continued.

32 Vict. c. 116, by which a partner can be criminally convicted for feloniously stealing partnership property. *THE QUEEN v. WARBURTON* 274

CONSTABLE—Refusal to aid in the Execution of his Duty—Indictment.] An indictment for refusing to aid a constable in the execution of his duty, and to prevent an assault made upon him by persons in his custody with intent to resist their lawful apprehension, need not shew that the apprehension was lawful, nor aver that the refusal was on the same day and year as the assault, or that the assault which the defendant refused to prevent was the same as that which the prisoners made upon the constable; neither is it any objection that the assault is alleged to have been made with intent to resist their lawful apprehension by persons already in custody. *THE QUEEN v. CALEB SHERLOCK* - - - 20

CONSTRUCTIVE POSSESSION - - - 136
See LARCENY. 4.

CONTINUANCE OF LIFE—Presumption - 1, 196
See PRESUMPTION OF DEATH. 1, 2.

CONTINUOUS ACT—Larceny - - - 315
See LARCENY. 1.

CONTINUOUS TAKING—Larceny - - - 172
See LARCENY. 3.

CONTRADICTION OF WITNESS—Indecent Assault—Attempt at Rape—Cross-examination of Prosecutrix—Previous Connection with other Men—Evidence.] The prosecutrix in an indictment for an indecent assault, which on the facts alleged amounted, in substance, to an attempt at rape, was asked in cross-examination whether she had not previously had connection with a man other than the prisoner, and denied it:—*Held*, that she could not be contradicted. *THE QUEEN v. HOLMES AND FURNESS* - - - 334

CONVICTION, PREVIOUS - 24, 182, 241, 363
See PREVIOUS CONVICTION.

COUNTY BRIDGE—Repair by hundred - 237
See BRIDGE, REPAIR OF.

COURT FOR CROWN CASES RESERVED—Jurisdiction—17 & 18 Vict. c. 78, s. 1.] No case can be stated for the opinion of this Court except upon some question of law arising on the trial. Where, therefore, the prisoner had pleaded guilty, and the question asked was whether the prisoner's act as described in the depositions supported the indictment, the Court held that they had no jurisdiction to consider the case. *THE QUEEN v. CLARK* 54

CREDIT—Impeaching witness - - - 70
See DISCREDITING WITNESS.

CRIMINAL ASSAULT—Indictment—Charge in one Count of assaulting and also of carnally knowing a Girl between the Age of Ten and Twelve Years—Verdict of Common Assault—Practice—Duplicitv.] Indictment, that the prisoner "in and upon one D., a girl above the age of ten years and under the age of twelve years . . . unlawfully did make an assault, and her, the said D., did then unlawfully and carnally know and abuse, against the form of the statute," &c., &c. The offence of carnally knowing the girl was disproved, but the jury found the prisoner guilty of a common assault:—

CRIMINAL ASSAULT—continued.

Held, that the prisoner might be properly convicted of a common assault, on the ground that the indictment charged two distinct misdemeanours, viz., of assaulting and also of carnally knowing D., and that the prisoner might be found guilty of either of them. *THE QUEEN v. GUTHRIE* 241

CROSS-EXAMINATION—Witness—Contradiction
See CONTRADICTION OF WITNESS. [334

DAMAGING ENGINE - - - 7
See MALICIOUS INJURY. 3.

DEATH—Presumption after absence of seven years - - - 1, 196
See PRESUMPTION OF DEATH. 1, 2.

DEED—Forgery—Antedating - - - 200
See FORGERY. 2.

DELIVERY BY OWNER OF STOLEN GOODS 15
See RECEIVING STOLEN GOODS. 1.

DEPOSITION—Bastary summons - - - 320
See PERJURY. 2.

DEPOSITION BEFORE JUSTICE—Evidence—Admission, after Death of Witness, of Deposition taken before Justice—Signature by Justice—11 & 12 Vict. c. 42, s. 17—Form of Indictment—Uncertainty—Surplusage.] Section 17 of 11 & 12 Vict. c. 42, enacts that justices, before they commit an accused person, shall "take the statement (M.) . . . of those who shall know the facts of the case, and shall put the same into writing, and such depositions shall be read over to and signed respectively by the witnesses who shall have been so examined, and shall be signed also by the justice or justices taking the same . . . and if, upon the trial of the person so accused, it shall be proved . . . that any person whose deposition shall have been taken as aforesaid, is dead . . . then, if such deposition purport to be signed by the justice by or before whom the same purports to have been taken, it shall be lawful to read such deposition as evidence in such prosecution, without further proof thereof." The reference (M.) is to a schedule of the Act where there is a form for these depositions, commencing with a heading containing the names of the witnesses examined, and concludes "the above depositions of C. D. and E. F. were taken and [sworn] before me at , on the day and year first above mentioned," and then follows immediately the signature of the justice:—*Held*,—overruling *Reg. v. Richards* (4 F. & F. 860),—that it is not necessary that each deposition should be signed by the justice taking it; and therefore where a number of depositions taken at the same hearing on several sheets of paper were fastened together and signed by the justices taking them, once only at the end of all the depositions in the form given in the schedule, that one of these depositions was inadmissible in evidence under s. 17 after the death of the witness making it, although no part of it was on the sheet signed by the justice.—An indictment charged A. with having made a false declaration before a justice that he had lost a pawnbroker's ticket, whereas he had not lost the ticket, "but had sold, lent, or deposited it with one" C.:—*Held*, that the indict-

DEPOSITION BEFORE JUSTICE—continued.

ment was not bad for uncertainty, because the words "had sold, lent, or deposited it" were mere surplusage, and therefore an error in them did not affect the indictment. *THE QUEEN v. PARKER* - - - 235

DISCREDITING WITNESS—Evidence—Witnesses—Impeaching Credit. In order to impeach the character of a witness for veracity, witnesses may be called to prove that his general reputation is such that they would not believe him upon his oath. *THE QUEEN v. BROWN AND HEDLEY* 70

DISORDERLY HOUSE. The defendants, as master and mistress, resided in a house to which men and women resorted for the purposes of prostitution, but no indecency or disorderly conduct was perceptible from the exterior of the house:—*Held*, that the defendants were guilty of keeping a disorderly house. *THE QUEEN v. PETER RICE AND MARY WILTON* - - - 21

DOCUMENTS—Notice to produce - - - 103
See NOTICE TO PRODUCE.

DUPLICITY—Pleading—Assault - - - 241
See CRIMINAL ASSAULT.

DUTY OF FATHER - - - 311
See ABANDONMENT OF INFANT. 1.

DYING DECLARATION—Evidence.—"No present hope of recovery." On a trial for murder a written declaration of the deceased was put in evidence for the prosecution. The declaration was made on oath to a magistrate's clerk, about thirteen hours before death. The clerk asked the deceased before he took down her statement, whether she felt she was likely to die? She said, "I think so, from the shortness of my breath." Her breath was then extremely short. The clerk said, "Is it with the fear of death before you that you make these statements, and have you any present hope of your recovery?"—She said, "None." The clerk then wrote out her statement, and added to it the above conversation, in the form of a statement by the deceased, but he omitted the word "present" before "hope." He then read over to the deceased what he had written, and she then added the words "at present" before "hope," and signed the declaration:—*Held*, that the statement was not admissible in evidence, as it did not appear to have been made under a settled hopeless expectation of death, inasmuch as the deceased had expressly qualified the words "no hope," by inserting before them the words "at present." *THE QUEEN v. JENKINS* - - - 187

ELECTION—Corrupt practices—Commissioners—Perjury - - - 243
See STATEMENT BEFORE ELECTION COMMISSIONERS.

EMBEZZLEMENT—Assistant Overseer. A person who is nominated and elected assistant overseer under the 59 Geo. 3. c. 12, s. 7, by the inhabitants of a parish in vestry, and who is afterwards appointed assistant overseer by the warrant of two justices, and performs the duties of an overseer, is well described in an indictment for embezzlement as the servant of the inhabitants of the parish. *THE QUEEN v. CARPENTER* - - - 29

2. — *Cheque—Indictment—24 & 25 Vict. c. 96, s. 71.* The 24 & 25 Vict. c. 26, s. 71, enacts

EMBEZZLEMENT—continued.

that, where the offence shall relate to any money or any valuable security, it shall be sufficient to allege the embezzlement, &c., to be of money, without specifying any particular coin or valuable security, and that such allegation so far as regards the description of the property, shall be sustained, if the offender shall be proved to have embezzled, or fraudulently applied or disposed of, any amount, although the particular species of coin or valuable security of which such amount was composed shall not be proved, or if he shall be proved to have embezzled, or fraudulently applied or disposed of, any piece of coin, or any valuable security, or any portion of the value thereof, although such piece of coin or valuable security may have been delivered to him in order that some part of the value thereof should be returned to the party delivering the same, or to some other person, and such part shall have been returned accordingly:—*Held*, that this enactment did not justify an allegation in an indictment of the embezzlement of money, where a cheque only had been embezzled, and there was no proof that the prisoner had ever cashed it. *THE QUEEN v. KEENA* - - - 113

3. — *Clerk, or Servant.* A person who is employed to get orders for goods, and to receive payment for them, but who is at liberty to get the orders and receive the money where and when he thinks proper, being paid by a commission on the goods sold, is not a clerk or servant within the meaning of the 24 & 25 Vict. c. 96, s. 68. *THE QUEEN v. BOWERS* - - - 41

4. — *"Clerk or Servant"—Treasurer of Friendly Society—24 & 25 Vict. c. 96, s. 68.* A. was treasurer of a friendly society, whose rules directed that all the moneys of the society should be paid to the treasurer, and that he should make no payments except on an order signed by the secretary, and countersigned by the chairman, or a trustee, and that he should give security. By another rule, all the moneys of the society were vested in trustees. A. was a member of the society, but received no payment for filling the office of treasurer:—*Held*, on an indictment against A., as clerk and servant of the trustees of the society, for embezzling money which he had received as treasurer, that A. was not the "clerk or servant" of the trustees within s. 68 of 24 & 25 Vict. c. 96. *THE QUEEN v. TAYLOR* - - - 177

5. — *Indictment—Evidence—Three Acts of Embezzlement in one Indictment—24 & 25 Vict. c. 96, s. 71—31 & 32 Vict. c. 116, s. 1.* The prisoner was a member of a co-partnership. It was his duty to receive money for the co-partnership, and once a week to render an account and pay over the gross amount received during the previous week. During each of three several weeks, within six months, the prisoner received various small sums, and failed to account for them at the end of the week, or to pay over the gross amount, but embezzled the money:—*Held*, that he might properly be charged with embezzling the weekly aggregates; that three acts of embezzlement of such weekly aggregates within six months might be charged and proved under one indictment; and that evidence of the small sums received during each week was admissible to shew how these aggregates were made up. *THE QUEEN v. BALLS* 338

EMBEZZLEMENT—continued.

- Friendly society—Rules in restraint of trade
See RESTRAINT OF TRADE. [230]
- ENGINE**—Damaging - - - 7
See MALICIOUS INJURY. 3.
- EVIDENCE**—Confession—Admissibility 98, 356
See CONFESION. 1, 2.
- Concealment of birth - - - 244
See CONCEALMENT OF BIRTH.
- Discrediting witness - - - 70
See DISCREDITING WITNESS.
- Dying declaration—No present hope of recovery - - - 187
See DYING DECLARATION.
- Election commissioners—Perjury - 248
See STATEMENT BEFORE ELECTION COMMISSIONERS.
- Embezzlement - - - 328
See EMBEZZLEMENT. 5.
- Examinations in bankruptcy—Admissibility in criminal case - - - 80
See BANKRUPT.
- Exposure of infant - - - 232
See ABANDONMENT OF INFANT.
- Notice to produce - - - 103
See NOTICE TO PRODUCE.
- Presumption of death—Absence for seven years - - - 1, 196
See PRESUMPTION OF DEATH. 1, 2.
- Proof of previous conviction - - - 214
See PREVIOUS CONVICTION. 3.
- Signature of justice - - - 225
See DEPOSITION BEFORE JUSTICE.
- Unregistered ship—Jurisdiction - 284
See UNREGISTERED SHIP.
- Witness—Contradiction - - - 334
See CONTRADICTION OF WITNESS.
- Witness—Follow-prisoner - - - 349
See COMPETENCE OF WITNESS. 1.
- Witness—Wife of fellow-prisoner - 377
See COMPETENCE OF WITNESS, 2.
- Withdrawal of, from jury - - - 33
See COMPETENCE OF WITNESS. 3.
- EVIDENCE HEARD OUT OF COURT**—Mistrial 378
See VIEW.
- EXPOSING THE PERSON** - - - 282
See NUISANCE.
- EXPOSURE**—Infant - - - 222, 311
See ABANDONMENT OF INFANT. 1, 2.
- FALSE OATH**—Perjury—Affidavit - 212
See AFFIDAVIT WITH BILL OF SALE.

FALSE PRETENCES—Intent. The crime of obtaining goods by false pretences is complete, although, at the time when the prisoner made the pretence and obtained the goods, he intended to pay for them when it should be in his power to do so. *THE QUEEN v. FRANCIS NAYLOR* - 4

2. — *Misrepresentation of Quality—Specific Fact.* The prisoner induced the prosecutor to purchase a chain from him by fraudulently representing that it was 15-carat gold, when, in fact, it was only of a quality a trifle better than 6-carat, knowing at the time that he was falsely representing the quality of the chain as 15-carat gold :

FALSE PRETENCES—continued.

—*Held*, that the statement that the chain was 15-carat gold, not being mere exaggerated praise, nor relating to a mere matter of opinion, but a statement as to a specific fact within the knowledge of the prisoner, was a sufficient false pretence to sustain an indictment for obtaining money under false pretences.—*Reg. v. Bryan* (Deears. & B. Cr. C. 265) distinguished. *THE QUEEN v. ARDLEY* - - - 301

3. — 24 & 25 Vict. c. 96, s. 88—*Temporary use of Chattel.* Section 88 of 24 & 25 Vict. c. 96, enacts that "whosoever shall, by any false pretence, obtain from any other person any chattel, money, or valuable security, with intent to defraud, shall be guilty of a misdemeanour . . .":—*Held*, that "obtain" does not mean obtain the loan of, but obtain the property in, any chattel, &c., and that to constitute an obtaining by false pretences, it is essential that there should be an intention to deprive the owner wholly of the property in the chattel, and, consequently, that obtaining by false pretences the use of a chattel for a limited time only, without an intention to deprive the owner wholly of the chattel, is not an obtaining by false pretences within s. 88 of 24 & 25 Vict. c. 96. *THE QUEEN v. KILHAM* - - - 261

4. — *Remoteness.* A conviction for obtaining a chattel by false pretences is good, although the chattel is not in existence at the time the pretence is made, provided the subsequent delivery of the chattel is directly connected with the false pretence. Whether or not there is such a direct connection is a question for a jury. *THE QUEEN v. MARTIN* - - - 56

— Master and servant—Authority 150, 295
See LARCENY. 5, 6.

FATHER—Abduction—Possession - - 184
See ABDUCTION.

— Duty of - - - 311
See ABANDONMENT OF INFANT. 1.

FELONY—*Soliciting and inciting to commit—Accessory*—24 & 25 Vict. c. 94, s. 2.] The offence of soliciting and inciting a man to commit a felony is, where no such felony is actually committed, a misdemeanour only, and not a felony under the 24 & 25 Vict. c. 94, s. 2, which only applies to cases where a felony is committed as the result of the counselling and procuring therein mentioned. *THE QUEEN v. GREGORY* - - - 77

— Previous conviction—Coin - - - 214
See PREVIOUS CONVICTION. 3.

— Previous conviction—Indictment—Felony [182, 363
See PREVIOUS CONVICTION. 1, 2.

FEME COVERT—Bankruptcy - - - 80
See BANKRUPT.

FERE NATURE—Animals - - - 158, 315
See LARCENY. 1, 2.

FORGERY—"Acquittance or Receipt for Money"—24 & 25 Vict. c. 98, s. 23.] Section 23 of 24 & 25 Vict. c. 98, enacts that "whosoever shall forge . . . any acquittance or receipt for money . . . shall be guilty of felony."—A. was secretary of a friendly society which had branches in various towns. Any member, who had paid all his dues, on going from one of these towns to another, was

FORGERY—continued.

entitled to a document called a "clearance," which admitted him to membership at any place where a branch of the society existed. The qualifications for membership were the payment of an entrance fee, a time of probation, and certain general payments which were made to the secretary, whose duty it was at once to hand them over to the treasurer. A clearance had to be signed by the secretary and by two other officers of the society. Neither of these two officers received or was responsible for any of these payments, nor were their signatures to a clearance understood as importing that any money had been received by them. C., a member of the society, was entitled to a clearance, having paid A. all his dues, but the money he had so paid had not been accounted for by A. to the treasurer. A. sent C. a clearance to which he had forged the names of the two officers whose signatures besides his own were necessary for the validity of the clearance. The clearance certified that the bearer C. was a member of the branch of the society granting it, and had paid all dues and demands, and it then authorized any other branch to receive C. as a clearance member:—*Held*, that the clearance was not an "acquittance or receipt for money within s. 23 of 24 & 25 Vict. c. 98. *THE QUEEN v. FRENCH* - - - 217

2. — *Antedated Deed*—"Forge"—24 & 25 Vict. c. 98, s. 20.] It is forgery to make a deed fraudulently with a false date, when the date is a material part of the deed, although the deed is in fact made and executed by and between the persons by and between whom it purports to be made and executed. *THE QUEEN v. RITSON* - 300

3. — *Bank-notes—Scotch Bank*—24 & 25 Vict. c. 98, ss. 16, 55.] The 24 & 25 Vict. c. 98, s. 16, extends to the engraving in England without authority of notes purporting to be notes of a banking company carrying on business in Scotland only; notwithstanding that s. 55 enacts that nothing in the Act contained shall extend to Scotland. *THE QUEEN v. BRACKENRIDGE AND KING* - - - 133

4. — "Warrant," "Authority," "Request," "for the Payment of Money"—*Receipt*—24 & 25 Vict. c. 98, s. 24.] Section 24 of 24 & 25 Vict. c. 98, enacts that "whosoever, with intent to defraud, shall make . . . any warrant, order, authority, or request for the payment of money . . . for, in the name, or on the account, of any other person, without lawful authority or excuse, . . . shall be guilty of felony:—*Held*, that a document, in form a mere receipt given by a depositor to a building society that received money on deposit, might properly be described in an indictment as a "warrant," "authority," or "request" "for the payment of money," if, by the custom of the society, such receipts were in fact treated as warrants, authorities, and requests for the payment of money; and, therefore, that a person forging such a receipt might be properly convicted under s. 24 of 24 & 25 Vict. c. 98, upon an indictment so describing the document as a "warrant," "authority," or "request," "for the payment of money." *THE QUEEN v. KAY* - 257

5. — 24 & 25 Vict. c. 98, s. 23—"Undertaking." The prisoner, being pressed for pay-

FORGERY—continued.

ment of a debt, obtained further time to pay, by giving, as security, an I. O. U., purporting to be signed by himself and another, the signature of the latter being forged by the prisoner:—*Held*, that the instrument was an "undertaking for the payment of money" within the meaning of 24 & 25 Vict. c. 98, s. 23. *THE QUEEN v. CHAMBERS* 341

FRAUD—Consent—Rape - - - 156
See RAPE.

— **Partnership** - - - 274
See CONSPIRACY.

— **Possession of goods obtained by** - 125
See LARCENY. 10.

"**FRAUDULENT PURPOSE**" - - - 347
See LARCENY. 11.

FRIENDLY SOCIETY—Restraint of trade—Illegality - - - 230
See RESTRAINT OF TRADE.

— **Treasurer—"Clerk or servant"** - 177
See EMBEZZLEMENT. 4.

GAME—Larceny - - - 158, 315
See LARCENY. 1, 2.

GAS—Larceny—Continuous taking - 172
See LARCENY. 3.

GOODS IN BUILDING—Setting fire to - 307
See MALICIOUS INJURY. 4.

HABITUAL CRIMINALS ACT (32 & 33 Vict. c. 99), s. 11 - - - 268
See RECEIVING STOLEN GOODS. 4.

HIGHWAY ACT, 1835 (5 & 6 Wm. 4, c. 50), s. 5
See BRIDGE, REPAIR OF. [237]

HOUSE - - - 21
See DISORDERLY HOUSE.

HUNDRED—Liability to repair bridge - 237
See BRIDGE, REPAIR OF.

HUNDRED BRIDGE—Repair by hundred 237
See BRIDGE, REPAIR OF.

HUSBAND AND WIFE—Effect of conviction of wife for embezzlement under 24 & 25 Vict. c. 194, s. 221 - - - 80
See BANKRUPT.

— **Witness—Fellow-prisoner** - - - 377
See COMPETENCE OF WITNESS. 2.

IDIOT—Consent—Rape - - - 39
See RAPE. 2.

ILLEGALITY—Restraint of trade - - - 230
See RESTRAINT OF TRADE.

IMMATERIAL AVERMENT—Arson—Ownership - - - 344
See MALICIOUS INJURY. 2.

IMPEACHING CREDIT OF WITNESS—Evidence
See DISCREDITING WITNESS. [70]

INCITING TO COMMIT A FELONY—What amount to - - - 77
See FELONY.

INCOMPETENCE OF WITNESS - - - 33
See WITNESS, COMPETENCE OF. 3.

INDECENT ASSAULT —Evidence—Relevance	334
<i>See</i> CONTRADICTION OF WITNESS.	
INDECENTLY EXPOSING THE PERSON	383
<i>See</i> NUISANCE.	
INDICTMENT —Amendment	123
<i>See</i> AMENDMENT OF INDICTMENT.	
— Arson—Averment of ownership	344
<i>See</i> MALICIOUS INJURY. 2.	
— Assault	241
<i>See</i> CRIMINAL ASSAULT.	
— Attempt	231
<i>See</i> ATTEMPT TO COMMIT CRIME.	
— Constable—Refusal to aid	20
<i>See</i> CONSTABLE.	
— Embezzlement	113, 323
<i>See</i> EMBEZZLEMENT. 2, 5.	
— Joint—Receiving stolen goods	31
<i>See</i> RECEIVING STOLEN GOODS. 3.	
— Neglect—Infant	99
<i>See</i> NEGLECT OF INFANT.	
— Perjury	290
<i>See</i> PERJURY.	
— Previous conviction	182, 363
<i>See</i> PREVIOUS CONVICTION. 1, 2.	
— Stealing valuable securities	61
<i>See</i> LARCENY. 12.	
— Uncertainty—Surplusage	225
<i>See</i> DEPOSITION BEFORE JUSTICE.	
— Unlawful wounding—Assault	194
<i>See</i> UNLAWFUL WOUNDING. 1.	
INFAMOUS CRIME —Threat to accuse of	13
<i>See</i> THREAT TO ACCUSE OF INFAMOUS CRIME.	
INFANT —Abandonment	223, 311
<i>See</i> ABANDONMENT OF INFANT. 1, 2.	
— Neglect of	99
<i>See</i> NEGLECT OF INFANT.	
INFLECTING GRIEVOUS BODILY HARM —Practice—Indictment	194
<i>See</i> UNLAWFUL WOUNDING. 1.	
INFORMATION under 9 Geo. 6, c. 69, s. 1	123
<i>See</i> AMENDMENT OF INDICTMENT. 1.	
INTENT —False pretences	4
<i>See</i> FALSE PRETENCES.	
— Felony	234
<i>See</i> COINING.	
INTERNATIONAL LAW —Jurisdiction of Admiralty Court—Manlaughter	161
<i>See</i> ADMIRALTY COURT JURISDICTION.	
INVALID MARRIAGE —Bigamy	367
<i>See</i> BIGAMY. 2.	
JOINT INDICTMENT —Receiving stolen goods	31
<i>See</i> RECEIVING STOLEN GOODS. 3.	
JOINT TRIAL —Witness—Fellow-prisoner	349, 377
<i>See</i> COMPETENCE OF WITNESS. 1, 2.	
JURISDICTION —Admiralty Court	161
<i>See</i> ADMIRALTY COURT JURISDICTION.	
— Averment—Perjury	290
<i>See</i> PERJURY. 1.	
— Court for Crown Cases Reserved	54, 378
<i>See</i> COURT FOR CROWN CASES RESERVED—VIEW.	

JURISDICTION —Justices—Apprentice	71
<i>See</i> PERJURY. 5.	
— Justices—Bastardy	110, 390
<i>See</i> PERJURY. 3, 4.	
— Justices—Larceny	136
<i>See</i> LARCENY. 4.	
— Local marine board	49
<i>See</i> PERJURY. 6.	
— Unregistered ship—Evidence	264
<i>See</i> UNREGISTERED SHIP.	
JURY —Evidence heard out of court—Mistrial	378
<i>See</i> VIEW.	
— Withdrawal of evidence from	33
<i>See</i> COMPETENCE OF WITNESS. 3.	
JUSTICE —Depositions—Signature of justice	225
<i>See</i> DEPOSITION BEFORE JUSTICE.	
JUSTICES JURISDICTION —Apprentice	136
<i>See</i> PERJURY. 5.	
— Larceny	71
<i>See</i> LARCENY. 4.	
— Bastardy	110, 390
<i>See</i> PERJURY. 3, 4.	

LARCENY—*Animals feræ Nature—Killing and Removal after an Interval of Time—Continuous Act.*] Poachers, of whom the prisoner was one, wrongfully killed a number of rabbits upon land belonging to the Crown. They placed the rabbits in a ditch upon the same land, some of the rabbits in bags, and some strapped together. They had no intention to abandon the wrongful possession of the rabbits which they had acquired by taking them, but placed them in the ditch as a place of deposit till they could conveniently remove them. About three hours afterwards the prisoner came back, and began to remove the rabbits:—*Held*, that the taking of the rabbits and the removal of them were one continuous act, and that the removal was therefore not larceny. *THE QUEEN v. TOWSLEY* - - - 315

2. — *Animals feræ Nature—Young Partridges reared under a common Hen.*] Partridges, hatched and reared by a common hen, while they remain with her, and from their inability to escape are practically under the dominion and in the power of the owner of the hen, may be the subject of larceny, though the hen is not confined in a coop or otherwise, but allowed to wander with her brood about the premises of her owner. *Reg. v. Cory* (10 Cox, Cr. C. 23) followed. *THE QUEEN v. SHICKLE* - - - 158

3. — *Continuous Taking—Abstraction of Gas.*] A. stole gas for the use of a manufactory by means of a pipe which drew off the gas from the main without allowing it to pass through the meter. The gas from this pipe was burnt every day, and turned off at night. The pipe was never closed at its junction with the main, and consequently always remained full of gas:—*Held*, that as the pipe always remained full, there was, in fact, a continuous taking of the gas, and not a series of separate takings; but *held*, further, that, even if the pipe had not been thus kept full, the taking would have been continuous, as it was substantially all one transaction. *THE QUEEN v. FIRTH* - - - 172

LARCENY—continued.

4. — *Constructive Possession—Jurisdiction* —24 & 25 *Vict. c. 96, s. 114.*] The prisoner stole a watch at Liverpool, and sent it by railway to a confederate in London:—*Held*, that the constructive possession still remained in the prisoner, and that he was triable at the Middlesex Sessions. *THE QUEEN v. ROGERS* - 136

5. — *False Pretences—Master and Servant—Distinction between general and limited Authority of Servant.*] Where a servant is entrusted with his master's property with a general authority to act for his master in his business, and is induced by fraud to part with his master's property, the person who is guilty of the fraud and so obtains the property, is guilty of obtaining it by false pretences, and not of larceny, because to constitute larceny there must be a taking against the will of the owner, or of the owner's servant duly authorized to act generally for the owner.—But where a servant has no such general authority from his master, but is merely entrusted with the possession of his goods for a special purpose, and is tricked out of that possession by fraud, the person who is guilty of the fraud and so obtains the property, is guilty of larceny, because the servant has no authority to part with the property in the goods except to fulfil the special purpose for which they were entrusted to him.—The cashier of a bank is a servant having a general authority to conduct the business of the bank, and to part with its property on the presentation of a genuine order from a customer; and if he is deceived by a forged order, and parts with the money of the bank, he parts, intending so to do, with the property in the money, and the person knowingly presenting such forged order is guilty of obtaining the money by false pretences, and not of larceny. *THE QUEEN v. PRINCE* - 150

6. — *False Pretences—Master and Servant—Misappropriation of Money by Servant.*] A servant, whose duty it was to pay his master's workmen, and for this purpose to obtain the necessary money from his master's cashier, fraudulently represented to the cashier that the wages due to one of the workmen were larger than they really were, and so obtained from him a larger sum than was in fact necessary to pay the workman. He did this intending at the time to appropriate the balance to his own use. Out of the sum so received he paid the workmen the wages really due to them, and appropriated the balance to his own use:—*Held*, that whether the obtaining of the money in the first instance was larceny or obtaining money by false pretences, the money while it remained in the prisoner's custody was the property and in the possession of the master, and therefore the misappropriation of it by the servant was larceny. *THE QUEEN v. COOKE* 295

7. — *Indictment—Property.*] The prisoner was sent by his fellow-workmen to their common employer, to get the wages due to all of them. He received the money in a lump sum, wrapped up in paper, with the names of the workmen and the sum due to each written inside:—*Held*, that he received the money as the agent of his fellow-workmen, and not as the servant of the employer,

LARCENY—continued.

and that, in an indictment against him for stealing it, the money was wrongly described as the property of the employer. *THE QUEEN v. BARNES* [45

8. — *Lost Property.*] The prisoner found a sovereign on a highway, believing at the time that it had been accidentally lost; but, nevertheless, with a knowledge that he was doing wrong, he at once determined to appropriate it, notwithstanding it should afterwards become known to him who the owner was. There was no evidence to shew that the prisoner believed he could ascertain who the true owner was at the time he found the sovereign:—*Held*, on the authority of *Reg. v. Thurborn* (1 Den. Cr. C. 387; 18 L. J. (M.C.) 140), that the prisoner was not guilty of larceny. *THE QUEEN v. GLYDE* - 139

9. — *Mock Auction—"Taking"—Payment made under Fear.*] A. acted as auctioneer at a mock auction. He knocked down some cloth for 26s. to B., who had not bid for it, as A. knew. B. refused to take the cloth or to pay for it; A. refused to allow her to leave the room unless she paid. Ultimately, she paid the 26s. to A., and took the cloth. She paid the 26s. because she was afraid. A. was indicted for, and convicted of, feloniously stealing these 26s.:—*Held*, that the conviction was right, because if the force used to B. made the taking a robbery, larceny was included in that crime; if the force was not sufficient to constitute a robbery, the taking of the money nevertheless amounted to larceny, as B. paid the money to A. against her will, and because she was afraid.—*Held*, further, that, under the circumstances, it was not necessary that the jury should be asked whether B. paid the money against her will, as from the evidence stated in the case it was clear that there could have been no doubt in the minds of the jury that the money was so paid. *THE QUEEN v. MCGRATH* - 205

10. — *Possession obtained by Fraud.*] The prisoner with another man went into the shop of the prosecutrix and asked for a pennyworth of sweetmeats, for which he put down a florin. The prosecutrix put it into the money-drawer, and put down one shilling and sixpence in silver and fivepence in copper in change, which the prisoner took up. The other man said, "you need not have changed," and threw down a penny, which the prisoner took up; and the latter then put down a sixpence in silver and sixpence in copper on the counter, saying, "Here, mistress, give me a shilling for this." The prosecutrix took a shilling out of the money-drawer and put it on the counter, when the prisoner said to her, "You may as well give me the two-shilling-piece and take it all." The prosecutrix took from the money-drawer the florin she had received from the prisoner, and put that on the counter, expecting she was to receive two shillings of the prisoner's money in exchange for it. The prisoner took up the florin; and the prosecutrix took up the silver sixpence and the sixpence in copper put down by the prisoner, and also the shilling put down by herself, and was putting them into the money-drawer, when she saw she had only got one shilling's worth of the prisoner's money; but at that moment the prisoner's companion drew away her attention, and, before

LARCENY—continued.

she could speak, the prisoner pushed his companion by the shoulder, and both went out of the shop:—*Held*, that the property in the florin had not passed to the prisoner, and that he was rightly convicted of larceny. *THE QUEEN v. MCKALE* 125

11. — *Process of Court—Taking with fraudulent Purpose—24 & 25 Vict. c. 96, s. 30.*] The prisoner's goods having been seized under warrants of execution of a county court, and being in possession of the bailiff, the prisoner, with intent to deprive the bailiff, as he supposed, of his authority, and so defeat the execution, forcibly took the warrants from him:—*Held*, that the prisoner was not guilty of larceny, but that he was guilty of taking the warrants for a fraudulent purpose within the meaning of 24 & 25 Vict. c. 96, s. 30. *THE QUEEN v. THOMAS BAILEY* 347

12. — *Valuable Security—24 & 25 Vict. c. 96, ss. 1, 27—Indictment.*] An indictment under 24 & 25 Vict. c. 96, s. 27, for stealing a valuable security, must particularize the kind of valuable security stolen; and any material variance between the description in the indictment and the evidence, if not amended, will be fatal. *THE QUEEN v. LOWRIE* - - - 61

— Partner receiving stolen goods - - - 366
See RECEIVING STOLEN GOODS. 4.

LAWFUL AUTHORITY OR EXCUSE - - - 384
See COINING.

LOCAL MARINE BOARD—Jurisdiction - - - 49
See PERJURY. 6.

LOST PROPERTY—Larceny - - - 129
See LARCENY. 8.

LUNATIC—8 & 9 Vict. c. 100, ss. 90, 114.] Imbecility and loss of mental power, whether arising from natural decay or from paralysis, softening of the brain or other natural cause, and although unaccompanied by frenzy or delusion of any kind, constitute unsoundness of mind amounting to lunacy within the meaning of 8 & 9 Vict. c. 100. *THE QUEEN v. SHAW* - - - 145

MALICE—Unlawfully wounding - - - 356
See UNLAWFUL WOUNDING. 2.

MALICIOUS INJURY—Arson—24 & 25 Vict. c. 97, s. 6—Building—Unfinished House.] A building in 24 & 25 Vict. c. 97, s. 6, is not necessarily a finished structure.—An unfinished house, of which the walls were built and finished, the roof on and finished, a considerable part of the flooring laid, and the internal walls and ceilings prepared ready for plastering, *held*, to be a building within the meaning of the section. *THE QUEEN v. MANNING AND ROGERS* - - - 338

2. — *Arson—Indictment—Immaterial Averment—Statement of Ownership—24 & 25 Vict. c. 97, ss. 3, 60.*] Two prisoners were indicted under 24 & 25 Vict. c. 97, s. 3, for feloniously setting fire to a shop "of and belonging to" one of the prisoners:—*Held*, that the averment of property in the prisoner was an immaterial averment, which need not be proved; and that an intent to injure another person as owner might be proved in support of the indictment. *THE QUEEN v. JOSEPH NEWBOULT AND BENJAMIN HOLDSWORTH* - - - 344

MALICIOUS INJURY—continued.

3. — *Damaging Engine—24 & 25 Vict. c. 97, s. 15.*] The prisoner plugged up the feed-pipe of a steam-engine, and displaced other parts of the engine in such a way as rendered it temporarily useless, and would have caused an explosion, if the obstruction had not been discovered, and, with some labour, removed:—*Held*, that he was guilty of damaging the engine with intent to render it useless, within the meaning of the 24 & 25 Vict. c. 97, s. 15. *THE QUEEN v. WILLIAM FISHER* - - - 7

4. — *Setting Fire to Goods in a Building—24 & 25 Vict. c. 97, s. 7.*] By 24 & 25 Vict. c. 97, s. 7, whosoever shall unlawfully and maliciously set fire to any matter or thing being in, against, or under any building, under such circumstances that if the building were thereby set fire to the offence would amount to felony, is guilty of felony.—The prisoner, from ill-will and malice against a person lodging in a house, made a pile of her goods on the stone floor of the kitchen, and set fire to them, under such circumstances that the house would almost certainly have been burned had not the police extinguished the fire before the house was actually ignited. The judge at the trial told the jury, that if the house had caught fire from the burning goods, the question whether the offence would have amounted to felony would have depended upon whether such a setting fire to the house would have been malicious and with intent to injure, so as to bring the case within 24 & 25 Vict. c. 97, s. 3; and that, though the prisoner's object was only to destroy the goods, and injure the owner of them, and not to destroy the house, or injure the landlord, yet if they thought he was aware that what he was doing would probably set the house on fire, and so necessarily injure the owner, and was at best reckless whether it did so or not, they ought to find that if the building had caught fire from the setting fire to the goods, the offence would have been felony, otherwise not. The jury found that the prisoner was guilty, but not so that if the house had caught fire the setting fire to the house would have been wilful and malicious:—*Held*, that upon the finding of the jury the prisoner was not guilty of felony. *THE QUEEN v. CHILD* 307

5. — *Wounding Cattle—24 & 25 Vict. c. 97, s. 40.*] Upon an indictment under 24 & 25 Vict. c. 97, s. 40, for maliciously wounding a horse, it is not necessary to prove that any instrument was used to inflict the wound. *THE QUEEN v. BULLOCK* [115

— Trees - - - - - 118
See TREES.

MANSLAUGHTER—Jurisdiction—Admiralty Court - - - 161
See ADMIRALTY COURT.

MARINE BOARD, LOCAL—Jurisdiction - - - 49
See PERJURY. 6.

MARRIAGE—Before registrar—Mismomer 365
See BIGAMY. 1.

— Invalidity—Bigamy - - - 367
See BIGAMY. 2.

MARRIED WOMAN—Bankruptcy - - - 80
See BANKRUPT.

- MASTER AND APPRENTICE**—Jurisdiction—
Perjury - - - - - 71
See PERJURY. 5.
- MASTER AND SERVANT**—Larceny—Authority
See LARCENY. 5, 6, 7. [48, 150, 295]
- MATERIALITY**—Perjury - - - - - 107
See PERJURY. 7.
- MERCHANT SHIPPING ACT, 1854** (17 & 18 Vict. c. 104) s. 106 - - - - - 264
See UNREGISTERED SHIP.
- s. 267 - - - - - 161
See ADMIRALTY COURT JURISDICTION.
- MISDEMEANOUR INCLUDING LESSER MISDEMEANOUR** - - - - - 194
See UNLAWFUL WOUNDING. 1.
- MISNOMER**—Marriage before registrar - 265
See BIGAMY. 1.
- MISREPRESENTATION OF QUALITY** - 301
See FALSE PRETENCES. 2.
- MISTRIAL**—Evidence heard out of court - 378
See VIEW.
- MOCK AUCTION**—Taking—Payment under fear
See LARCENY. 9. [205]
- NEGLECT**, meaning of, in an indictment - 99
See NEGLECT OF INFANT.
- NEGLECT OF INFANT**—Neglect to provide for Infant—Indictment.] The prisoner was convicted on an indictment which charged him with neglecting to provide food and clothing for his child, but omitted specifically to allege his ability to do so:—*Held*, that the ability to provide was implied, and therefore sufficiently averred, in the use of the word “neglect.” *THE QUEEN v. RYLAND* 99
- NEGLECT IN PROVIDING FOOD FOR AN INFANT CHILD** - - - - - 99
See NEGLECT OF INFANT.
- NO PRESENT HOPE OF RECOVERY** - 187
See DYING DECLARATION.
- NOTICE TO PRODUCE**—Evidence.] The prisoner, a solicitor, was indicted for perjury in having sworn that there was no draft of a certain statutory declaration made by a client. No notice to produce the draft had been given to the prisoner; and upon his trial it was proved to have been last seen in his possession. Secondary evidence having been given of its contents:—*Held*, that, in the absence of such notice, secondary evidence was inadmissible. *THE QUEEN v. ELWORTHY* - 103
- NUISANCE**—Indecently exposing the Person—Public Place—Urinal.] The prisoners were convicted of indecently exposing their persons in a urinal, open to the public, which stood on a public footpath in Hyde Park, and the entrance to which was from the footpath:—*Held*, that the jury might well find the urinal to be a public place, and that, therefore, the conviction was good.—*Reg. v. Orchard* (3 Cox, Cr. C. 248), observed upon. *THE QUEEN v. HARRIS AND COCKS* - - - 232
- OBSTRUCTION OF TRAIN**—24 & 25 Vict. c. 97, s. 36—*Altering Signals.*] 24 & 25 Vict. c. 97, s. 36, enacts that, “whoever, by any unlawful act, or by any wilful omission or neglect, shall obstruct, or cause to be obstructed, any engine or carriage using any railway, . . . shall be guilty of a misdemeanour.”—The prisoner unlawfully altered some railway signals at a railway station. The alteration caused a train, which would have passed the station without slackening speed, to slacken speed, and to come nearly to a stand. Another train going in the same direction, and on the same rails, was due at the station in half an hour:—*Held* (Martin, B., dissenting), that the prisoner had “obstructed” a train within the meaning of s. 36 of 24 & 25 Vict. c. 97. *THE QUEEN v. HADFIELD* - - - - - 253
2. — 24 & 25 Vict. c. 97, s. 36—*Making Signals.*] 24 & 25 Vict. c. 97, s. 36, enacts that, “whoever by any unlawful act, or by any wilful omission or neglect, shall obstruct, or cause to be obstructed, any engine or carriage using any railway . . . shall be guilty of a misdemeanour.”—The prisoner, who was not a servant of the railway company, stood on a railway between the two lines of rails, at a point between two stations. As a train was approaching he held up his arms in the mode used by inspectors of the line when desirous of stopping a train between two stations. This, as the prisoner intended that it should, caused the driver to shut off steam and diminish the speed, and led to a delay of four minutes:—*Held*, that the prisoner had obstructed a train within the meaning of 24 & 25 Vict. c. 97, s. 36. *THE QUEEN v. HARDY* - - - - - 278
- OBTAINING MONEY BY FALSE PRETENCES** [4, 56, 261, 301
See FALSE PRETENCES. 1, 2, 3, 4.
- - - - - 150, 295
See LARCENY. 5, 6.
- OFFICER, RESISTING** - - - - - 181
See ARREST. 1.
- OVERSEER, ASSISTANT** - - - - - 29
See EMBEZZLEMENT. 1.
- OWNER, DELIVERY OF STOLEN GOODS BY.** 15
See RECEIVING STOLEN GOODS. 1.
- OWNERSHIP**—Arson—Immaterial averment 344
See MALICIOUS INJURY. 2.
- PARTNER**—Fraud upon - - - - - 274
See CONSPIRACY.
- Larceny—Receiving stolen goods - 266
See RECEIVING STOLEN GOODS. 4.
- PARTRIDGES**—Larceny - - - - - 158
See LARCENY. 2.
- PAYMENT**—Fear—“Taking” - - - - - 205
See LARCENY. 9.
- PENAL SERVITUDE**—Indictment—Penal servitude - - - - - 182, 363
See PREVIOUS CONVICTION. 1, 2.
- PERJURY**—*Banker's Affidavit*—9 Geo. 4, c. 23, s. 7.] The affidavit verifying the return of the issue by a banker of unstamped bills and notes under the 9 Geo. 4, c. 23, may be sworn, either before a justice of the peace under s. 7 of that statute, or before a commissioner to administer oaths in Chancery under the 55 Geo. 3, c. 184, s. 52, the later enactment being cumulative only. The manager of a bank is a chief clerk within the meaning of the 9 Geo. 4, c. 23, s. 7, which requires such affidavit to be made by a cashier, accountant, or chief clerk. *THE QUEEN v. GREENLAND* - - - - - 65

PERJURY—continued.

2. — *Indictment—Substance of the Offence charged—Averment of Jurisdiction*—23 Geo. 2, c. 11, s. 1—14 & 15 Vict. c. 100, s. 20.] An indictment for perjury stated the offence to have been committed on the trial of "a certain indictment for misdemeanour" at the quarter sessions for the county of Salop; but it did not state what the misdemeanour was, nor that the quarter sessions had jurisdiction to try it:—*Held*, that the indictment was good. **THE QUEEN v. DUNNING** - 290

3. — *Jurisdiction—Bastardy Summons.*] The prisoner was convicted of perjury alleged to have been committed upon the hearing of an application for an order of affiliation. The information laid by the mother was duly proved; and it was shewn that the putative father appeared before the justices, and that evidence was given on both sides:—*Held*, that, the father having appeared and not having raised any objection to the summons, it was not necessary to refer to it or give any evidence of its existence on the trial for perjury. **THE QUEEN v. SMITH** - - - - 110

4. — *Jurisdiction—Bastardy Summons—Application before Birth of Child—Deposition*—7 & 8 Vict. c. 101, s. 2; 8 Vict. c. 10, s. 1.] Section 2 of 7 & 8 Vict. c. 101, enacts that where application for a bastardy summons is made before the birth of the child, "the woman shall make a deposition upon oath."—The prisoner was convicted of perjury, alleged to have been committed on the hearing of a bastardy summons. It appeared that the summons had been issued against the prisoner before the birth of the child. Upon the application for it no written deposition was made, but only a verbal statement upon oath by the woman. The prisoner appeared to the summons, and made no objection to its validity or to the jurisdiction of the Court:—*Held*, that the Court had jurisdiction to hear the summons, and that the conviction for perjury was right.—*Per Martin, B., Byles, and Blackburn, JJ.*: The word "deposition" in the above section means evidence taken down in writing.—*Per Blackburn, J.*: The enactment is only directory, and the absence of a deposition could not oust the jurisdiction.—*Per totam Curiam*: The irregularity was waived by the prisoner's appearing to the summons and not objecting. **THE QUEEN v. FLETCHER** - - - - 320

5. — *Jurisdiction—Master and Apprentice*—4 Geo. 4, c. 34, s. 2.] The prisoner was indicted for perjury committed before a police magistrate upon a summons taken out by him as an apprentice against his master under the 4 Geo. 4, c. 34, s. 2, for non-payment of wages:—*Held*, that the magistrate had jurisdiction to adjudicate upon the complaint, although the summons was not taken out until the relation of master and servant had ceased; and that, at any rate, he had jurisdiction to inquire into the existence of such relation. **THE QUEEN v. PROUD** - - - - 71

6. — *Jurisdiction—Local Marine Board*—17 & 18 Vict. c. 104, s. 241.] Wilful and corrupt false swearing before a local marine board lawfully constituted upon a matter material to an inquiry then being lawfully investigated by them in pursuance of the 17 & 18 Vict. c. 104, is perjury, and indictable as such. **THE QUEEN v. TOMLINSON** - - - - 49

PERJURY—continued.

7. — *Materiality.*] Upon the trial of one Sullivan for robbery, the prisoner, in support of an alibi, swore, first, that Sullivan was in a certain house at the time of the robbery; secondly, that Sullivan had lived in that house for the last two years; and, thirdly, that he had never been absent from it more than two or three nights together during that time. In fact Sullivan had been confined in prison during one out of these two years:—*Held*, that the second and third allegations were material as tending to render more credible the truth of the first, and that the prisoner was rightly convicted of perjury assigned upon them. **THE QUEEN v. TYSON** - - - - 107

— *Bills of Sale Act* - - - - 212

See *AFFIDAVIT WITH BILL OF SALE.*

— *Election Commissioners—Evidence* - 248

See *STATEMENT BEFORE ELECTION COMMISSIONERS.*

PERSON—Indicently exposing - - - 282
See *NUISANCE.*

PLEADING—*Arson—Indictment* - - 344
See *MALICIOUS INJURY. 2.*

— *Affidavit—False oath—Perjury* - 212
See *AFFIDAVIT WITH BILL OF SALE.*

— *Criminal assault* - - - - 241
See *CRIMINAL ASSAULT.*

— *Indictment—Embezzlement* - - - 328
See *EMBEZZLEMENT. 5.*

— *Indictment—Felony—Aiding and abetting* - - - - 221
See *ATTEMPT TO COMMIT CRIME.*

— *Indictment—Uncertainty—Surplusage* 225
See *DEPOSITION BEFORE JUSTICE.*

— *Indictment—Larceny* - - - - 61
See *LARCENY. 12.*

— *Indictment—Neglect* - - - - 99
See *NEGLECT OF INFANT.*

— *Prior conviction of felony not alleged in indictment* - - - - 182, 363
See *PREVIOUS CONVICTION. 1, 2.*

POLICEMAN - - - - - 20
See *CONSTABLE.*

POSSESSION—*Coining tools* - - - - 284
See *COINING.*

— *Constructive, of goods* - - - - 136
See *LARCENY. 4.*

— *of father—Abduction* - - - - 184
See *ABDUCTION.*

— *of goods obtained by fraud* - - - 125
See *LARCENY. 10.*

PRACTICE—*Amendment of indictment* - 122
See *AMENDMENT OF INDICTMENT. 1.*

— *Common Law—View* - - - - 378
See *VIEW.*

— *Case stated for Court for Crown Cases Reserved* - - - - 54
See *COURT FOR CROWN CASES RESERVED.*

— *Misdemeanour including lesser misdemeanour indictment* - - - - 194
See *UNLAWFUL WOUNDING. 1.*

PRESUMPTION OF DEATH—*Evidence—Continuance of Life—Bigamy—Absence for less than seven years.*] On a trial for bigamy, it was

PRESUMPTION OF DEATH—continued.

proved that the prisoner married A. in 1836, left him in 1843, and married again in 1847. Nothing was heard of A. after the prisoner left him, nor was any evidence given of his age:—*Held*, that there was no presumption of law either in favour of or against the continuance of A.'s life up to 1847; but that it was a question for the jury, as a matter of fact, whether or not A. was alive at the date of the second marriage. **THE QUEEN v. LUMLEY** - - - - - 196

2. — Bigamy—Absence during seven Years.]

Upon a trial for bigamy, when it is proved that the prisoner and his first wife have lived apart for the seven years preceding the second marriage, it is incumbent on the prosecution to shew that during that time he was aware of her existence; and in the absence of such proof, the prisoner is entitled to be acquitted. **THE QUEEN v. JOHN CURGERWEN** - - - - - 1

PRETENCES—False - - - - - 4, 56, 261, 301

See **FALSE PRETENCES**. 1, 2, 3, 4.

PREVIOUS CONVICTION—Misdemeanour—Practice—Prior Conviction of Felony not alleged in Indictment—Period of Penal Servitude—27 & 28 Vict. c. 47, s. 2.]

27 & 28 Vict. c. 47, s. 2, enacts, that when any person shall, on indictment, be convicted of any crime punishable with penal servitude, after having been previously convicted of felony, the least sentence of penal servitude that can be awarded shall be a period of seven years.—A. was convicted of the misdemeanour of having done grievous bodily harm to B. The indictment did not charge a previous conviction of felony; but after the jury had found A. guilty, it was proved on oath that A. had been previously convicted of felony, but no record or certificate of such conviction was produced. A. was sentenced to penal servitude for five years, as for a misdemeanour only without any previous conviction of felony:—*Held*, that the sentence was correct. **THE QUEEN v. SCHMERS** - - - - - 182

2. — Penal Servitude—Previous Conviction of Felony not charged in Indictment—27 & 28 Vict. c. 47, s. 2.]

By 27 & 28 Vict. c. 47, s. 2, "Where any person shall on indictment be convicted of any crime or offence punishable with penal servitude, after having been previously convicted of felony, the least sentence of penal servitude that can be awarded in such case shall be a period of seven years."—The prisoner was convicted of a crime punishable with penal servitude, and it was proved that he had been previously convicted of felony; but the previous conviction was not stated in the indictment:—*Held*, that the above section did not apply. **THE QUEEN v. WILLIS** - - - - - 363

3. — Practice—Proof of previous Conviction—Offences relating to the Coin—Misdemeanour—Felony—24 & 25 Vict. c. 99, ss. 12, 37.]

By s. 10 of 24 & 25 Vict. c. 99, uttering counterfeit coin, knowing it to be counterfeit, is a misdemeanour. By s. 11, the possession of counterfeit coin, knowing it to be counterfeit, and with intent to utter the same, is a misdemeanour. By s. 12, whosoever having been convicted, of (amongst others) any offence in the three preceding sections mentioned, shall afterwards com-

PREVIOUS CONVICTION—continued.

mit any of the offences mentioned in those sections, shall be guilty of felony, and liable to punishment as therein specified. By s. 37, where any person shall have been convicted of any offence against any Act relating to the coin, and shall afterwards be indicted for any offence against this Act, it shall be sufficient, in any such indictment, after charging such subsequent offence, to state and to prove at the trial the previous conviction in the manner therein specified, and upon any such indictment the prisoner shall in the first instance be arraigned upon and tried for the subsequent offence only; and if he is found guilty the previous conviction may then be inquired into, but not before.—A. was indicted under s. 12 for feloniously having in his possession counterfeit coin, after a previous conviction for uttering counterfeit coin:—*Held*,—overruling *Reg. v. Goodwin* (10 Cox, C. C. 534),—that s. 37 applies to a trial on an indictment under s. 12, and that therefore the previous conviction could not be proved until the jury had found A. guilty of the subsequent offence. **THE QUEEN v. MARTIN** - - - - - 214

4. — Transportation—Return—Certificate of previous Conviction—5 Geo. 4, c. 84, s. 24; 8 & 9 Vict. c. 113, s. 1.]

The certificate of a previous conviction required by 5 Geo. 4, c. 84, s. 24, is sufficient, by virtue of 8 & 9 Vict. c. 113, s. 1, if it purports to be signed by an officer having the custody of the records, although that officer is therein described as the deputy clerk of the peace of a borough. The certificate need not aver that the quarter sessions at which the prisoner was convicted were held by the recorder. **THE QUEEN v. JOHN PARSONS** - - - - - 24

— **Assault** - - - - - 90

See **AUTREFOIS CONVICT**.

— **Receiving stolen goods—Habitual Criminals Act (32 & 33 Vict. c. 99)** - - - - - 272

See **RECEIVING STOLEN GOODS**. 2.

PRISON ACT, 1865 - - - - - 27

See **PRISON BREACH**.

PRISON BREACH—The Prison Act, 1865 (28 & 29 Vict. c. 126), s. 37.]

The Prison Act, 1865 (28 & 29 Vict. c. 126), s. 37, which forbids the conveyance into any prison, with intent to facilitate the escape of a prisoner, of any mask, dress, or other disguise, or of any letter, or of any other article or thing, includes a crowbar. **THE QUEEN v. PAYNE** - - - - - 27

PROCESS OF COURT—Taking for fraudulent purpose - - - - - 347

See **LARCENY**. 11.

PROHIBITED DEGREES—Marriage—Bigamy [367

See **BIGAMY**. 2.

PROPERTY—Larceny - - - - - 45

See **LARCENY**. 7.

PUBLIC PLACE—Exposing the person - 282

See **NUBANCE**.

QUALITY, MISREPRESENTATION OF - 301

See **FALSE PRETENCES**.

RAILWAY—Obstruction of train - 253, 278

See **OBSTRUCTION TO TRAIN**. 1, 2.

RAPE—Woman's Consent obtained by Fraud.]

Where a woman consents to the act of connection, even though her consent is obtained by fraud, the act does not amount to rape. A woman while in bed with her husband permitted the prisoner, under the belief that he was her husband, to have connection with her:—*Held*, that, in the absence of proof that she was asleep or unconscious at the time the act of connection commenced, it must be taken that her consent was obtained by fraud, and that the prisoner's act did not amount to rape. **THE QUEEN v. BARROW** 156

2. — *Idiot—Consent.*] Upon an indictment for rape there must be some evidence that the act was without the consent of the woman, even where she is an idiot. In such a case, where there were no appearances of force having been used to the woman, and the only evidence of the connection was the prisoner's own admission, coupled with the statement that it was done with her consent, the Court held that there was no evidence for the jury. **THE QUEEN v. FLETCHER** [39

— Attempt—Aiding and abetting - 221
See **ATTEMPT TO COMMIT CRIME.**

— Evidence—Relevance - 334
See **CONTRADICTION OF WITNESS.**

RECEIPT—Forgery - 217
See **FORGERY.** 1.

RECEIVING STOLEN GOODS—Delivery by Owner.]

Four thieves stole goods from the custody of a railway company, and afterwards sent them in a parcel by the same company's line addressed to the prisoner. During the transit the theft was discovered; and, on the arrival of the parcel at the station for its delivery, a policeman in the employ of the company opened it, and then returned it to the porter whose duty it was to deliver it, with instructions to keep it until further orders. On the following day the policeman directed the porter to take the parcel to its address, when it was received by the prisoner, who was afterwards convicted of receiving the goods knowing them to be stolen, upon an indictment which laid the property in the goods in the railway company:—*Held*, by Martin, B., and Keating and Lush, JJ. (dissentientibus, Erle, C.J., and Mellor, J.), that the goods had got back into the possession of the owner, so as to be no longer stolen goods, and that the conviction was wrong. **THE QUEEN v. FANNY SCHMIDT** - 15

2. — *Evidence—Onus of Proof—Previous Conviction—Habitual Criminals Act (32 & 33 Vict. c. 99), s. 11—Construction.*] 32 & 33 Vict. c. 99, s. 11, enacts that when any person who has been previously convicted of certain specified offences "is found in possession of stolen goods, evidence of such previous conviction shall be admissible as evidence of his knowledge that such goods have been stolen;" and in proceedings against such person as receiver of stolen goods, proof may be given of his previous conviction, "provided that not less than seven days' notice shall be given to such person that proof is intended to be given of his previous conviction, and that he will be deemed to have known such goods to have been stolen until he has proved the contrary."—*Held*, on an indictment for receiving stolen goods, that service

RECEIVING STOLEN GOODS—continued.

of a notice under this section and proof of a previous conviction do not relieve the prosecution from the necessity of proving that the prisoner knew that the goods had been stolen. **THE QUEEN v. DAVIS** - 272

3. — *Joint Indictment—Separate Receipt—24 & 25 Vict. c. 96, s. 94.*] The 24 & 25 Vict. c. 96, s. 94, which enacts that, "If, upon the trial of any two or more persons indicted for jointly receiving any property, it shall be proved that one or more of such persons separately received any part or parts of such property, it shall be lawful for the jury to convict, upon such indictment, such of the said persons as shall be proved to have received any part or parts of the said property," extends to cases where, upon an indictment for a joint receipt, it is proved that the prisoners separately received the whole of the stolen property. **THE QUEEN v. REARDON AND BLOOR** - 31

4. — *Larceny by Partner—24 & 25 Vict. c. 96, s. 91—31 & 32 Vict. c. 116, s. 1—Construction.*] 24 & 25 Vict. c. 96, s. 91, enacts that, "whosoever shall receive any chattel, . . . the stealing or taking . . . whereof shall amount to a felony, either at common law or by virtue of this Act, knowing the same to have been feloniously stolen or taken, . . . shall be guilty of felony."—31 & 32 Vict. c. 116, s. 1, enacts that, "if any person, being a member of any copartnership . . . shall steal or embezzle any money or goods . . . of or belonging to such co-partnership . . . every such person shall be liable to be dealt with, tried, convicted, and punished for the same, as if such person had not been or was not a member of such co-partnership."—*Held*, that it is not an offence, under s. 91 of 24 & 25 Vict. c. 96, to receive stolen goods, knowing them to have been stolen, if the stealing is not a crime either at common law or under 24 & 25 Vict. c. 96, although the stealing is a felony under 31 & 32 Vict. c. 116, s. 1. **THE QUEEN v. SMITH** - 266

REFUSAL TO AID CONSTABLE IN EXECUTION OF HIS DUTY - 20
See **CONSTABLE.**

REGISTRAR, MARRIAGE BEFORE—Misnomer
See **BIGAMY.** 1. [365]

REGISTRATION—Unregistered ship - 264
See **UNREGISTERED SHIP.**

REMOVEDNESS—False pretences—Chattel not in existence - 56
See **FALSE PRETENCES.** 4.

REPAIRS—Bridge - 237
See **BRIDGE, REPAIR OF.**

REFUTATION—Discrediting witness - 70
See **DISCREDITING WITNESS.**

REQUEST—Payment of money—Forgery 267
See **FORGERY.** 4.

RESISTING OFFICER—Arrest - 75, 131
See **ARREST.** 1, 2.

RESTRAINT OF TRADE—Friendly Society—Illegality—Embezzlement—Right to the Protection of the Criminal Law.] S., an officer of a friendly society, some of whose rules were in restraint of trade, embezzled their money:—*Held*, that rules in restraint of trade are not criminal, although

RESTRAINT OF TRADE—continued.

they may be void as being against public policy, and that societies having such rules are entitled to the protection of the criminal law for their funds, and, consequently, that S. might properly be convicted of embezzlement. *THE QUEEN v. STAINER* [230

RETURN FROM TRANSPORTATION - 24

See PREVIOUS CONVICTION. 4.

SCOTCH BANK—Forgery of notes of - 133

See FORGERY. 3.

SECRET DISPOSITION—Body of child - 244

See CONCEALMENT OF BIRTH.

SECURITY—Indictment for stealing - 61

See LARCENY. 12.

SEPARATE RECEIPT - - - 31

See RECEIVING STOLEN GOODS. 3.

SETTING FIRE TO GOODS IN A BUILDING 307

See MALICIOUS INJURY. 4.

SHIP—Jurisdiction—Registration - - 264

See UNREGISTERED SHIP.

SIGNALS—Obstruction of train - 253-278

See OBSTRUCTION OF TRAIN. 1, 2.

SIGNATURE—Depositions before justice - 225

See DEPOSITIONS BEFORE JUSTICE.

SOCIETY FRIENDLY—Restraint of trade—Illegality - - - 230

See RESTRAINT OF TRADE.

SOLICITING TO COMMIT A FELONY—What amounts to - - - 77

See FELONY.

STATEMENT BEFORE ELECTION COMMISSIONERS—Evidence—Perjury—Answers to Commissioners for Inquiring into Existence of Corrupt Practices at Elections—26 Vict. c. 29, s. 7—Construction.] By 26 Vict. c. 29, s. 7, it is enacted, that witnesses before commissioners for inquiring into the existence of corrupt practices at elections shall not be excused from answering questions on the ground that the answers thereto may criminate them, and "that no statement made by any person in answer to any question put by such commissioners shall, except in cases of indictments for perjury, be admissible in evidence in any proceeding, civil or criminal":—Held, that "except in cases of indictments for perjury" applies only to perjury committed before the commissioners, and therefore, on an indictment for perjury committed at the trial of an election petition, evidence of answers to commissioners appointed to inquire into the existence of corrupt practices at the election in question is not admissible. *THE QUEEN v. BUTTLE* - - - 243

STATUTES.
23 Geo. 2, c. 11, s. 1 - - - 290
See PERJURY. 2.
59 Geo. 3, c. 12, s. 7 - - - 29
See EMBEZZLEMENT. 1.
5 Geo. 4, c. 84, s. 24 - - - 24
See PREVIOUS CONVICTION. 4.
9 Geo. 4, c. 23, s. 7 - - - 65
See PERJURY. 1.
— c. 69, s. 1—Amendment of - 129
See INDICTMENT. 1.

STATUTES—continued.

5 & 6 Wm. 4, c. 50, s. 5 - - - 237

See BRIDGE, REPAIR OF.

6 & 7 Wm. 4, c. 85, ss. 4, 42 - - - 365

See BIGAMY. 1.

7 & 8 Vict. c. 101, s. 2 - - - 110, 320

See PERJURY. 3, 4.

8 Vict. c. 10, s. 1 - - - 110, 320

See PERJURY. 3, 4.

8 & 9 Vict. c. 100, ss. 90, 114 - - - 145

See LUNATIC.

— c. 113, s. 1 - - - 24

See PREVIOUS CONVICTION. 4.

11 & 12 Vict. c. 42, s. 17 - - - 225

See DEPOSITION BEFORE JUSTICE.

— c. 43, Sched. (O. I) - - - 75

See ARREST. 2.

12 & 13 Vict. c. 106, s. 223 - - - 86

See BANKRUPT.

14 & 15 Vict. c. 19, s. 5 - - - 356

See UNLAWFUL WOUNDING. 2.

— c. 100, s. 9 - - - 221

See ATTEMPT TO COMMIT CRIME.

— s. 20 - - - 290

See PERJURY. 1.

17 & 18 Vict. c. 36 - - - 212

See AFFIDAVIT WITH BILL OF SALE.

— c. 78, s. 1 - - - 54

See COURT FOR CROWN CASES RESERVED.

— c. 104, s. 106 - - - 264

See UNREGISTERED SHIP.

— s. 241 - - - 49

See PERJURY. 6.

— s. 267 - - - 161

See ADMIRALTY COURT JURISDICTION.

24 & 25 Vict. c. 94, s. 2 - - - 77

See FELONY.

— c. 96, ss. 1, 27 - - - 61

See LARCENY. 12.

— s. 30 - - - 347

See LARCENY. 11.

— s. 32 - - - 118

See TREES.

— s. 47 - - - 12

See THREAT TO ACCUSE OF INFAMOUS CRIME.

— s. 68 - - - 41-177

See EMBEZZLEMENT. 3, 4.

— s. 71 - - - 113, 328

See EMBEZZLEMENT. 2, 5.

— s. 94 - - - 31

See RECEIVING STOLEN GOODS. 3.

— s. 114 - - - 136

See LARCENY. 4.

— c. 97, ss. 3, 60 - - - 344

See MALICIOUS INJURY. 2.

— s. 6 - - - 338

See MALICIOUS INJURY. 1.

— s. 7 - - - 307

See MALICIOUS INJURY. 4.

— s. 15 - - - 7

See MALICIOUS INJURY. 3.

— s. 36 - - - 253, 278

See OBSTRUCTION OF TRAIN. 1, 2.

STATUTES—continued.

24 & 25 Vict. c. 97, s. 40 -	-	115
See MALICIOUS INJURY. 5.		
— c. 98, s. 23 -	-	341
See FORGERY. 5.		
— ss. 16, 55 -	-	133
See FORGERY. 3.		
— s. 20 -	-	200
See FORGERY. 2.		
— s. 23 -	-	217
See FORGERY. 1.		
— s. 24 -	-	257
See FORGERY. 4.		
— c. 99, s. 24 -	-	234
See COINING.		
— ss. 12, 37 -	-	214
See PREVIOUS CONVICTION. 3.		
— c. 100, s. 18 -	-	366
See UNLAWFUL WOUNDING. 2.		
— s. 27 -	-	223, 311
See ABANDONMENT OF INFANT. 1, 2.		
— s. 45 -	-	90
See AUTREFOIS CONVICT.		
— s. 55 -	-	184
See ABDUCTION.		
— s. 57 -	-	367
See BIGAMY. 2.		
— s. 60 -	-	244
See CONCEALMENT OF BIRTH.		
— c. 104, s. 91 -	-	266
RECEIVING STOLEN GOODS. 4.		
— c. 134, s. 221 -	-	80
See BANKRUPT.		
26 Vict. c. 29, s. 7 -	-	248
See STATEMENT BEFORE ELECTION COMMISSIONERS.		
27 & 28 Vict. c. 47, s. 2 -	-	162, 363
See PREVIOUS CONVICTION.		
28 & 29 Vict. c. 126, s. 37 -	-	27
See PRISON BREACH.		
31 & 32 Vict. c. 116, s. 1 -	-	323
See EMBEZZLEMENT. 5.		
— - - - -	-	266
See RECEIVING STOLEN GOODS. 4.		
32 & 33 Vict. c. 99, s. 11 -	-	273
See RECEIVING STOLEN GOODS. 2.		
STOLEN GOODS—Receiving -	15, 31, 266, 273	
See RECEIVING STOLEN GOODS. 1, 2, 3, 4.		
SUBSTANCE OF OFFENCE CHARGED -	290	
See PERJURY. 1.		
SURPLUSAGE—Indictment—Uncertainty	225	
See DEPOSITION BEFORE JUSTICE.		
TAKING—Continuous—Larceny -	172	
See LARCENY. 3.		
— Mock auction—Payment under fear -	205	
See LARCENY. 9.		
THREAT TO ACCUSE OF AN INFAMOUS CRIME		
— Intent—24 & 25 Vict. c. 96, s. 47.] The prisoner threatened A.'s father that he would accuse A. of having committed an abominable offence upon a mare, for the purpose of putting off the mare and forcing the father, under terror of the threatened charge to buy and pay for her at the prisoner's		

THREAT TO ACCUSE OF AN INFAMOUS CRIME—continued.

price:—Held, that the prisoner was guilty of threatening to accuse, with intent to extort money, within the meaning of the 24 & 25 Vict. c. 96, s. 47. THE QUEEN v. HENRY REDMAN -	12
TIME—Absence -	1, 196
See PRESUMPTION OF DEATH. 1, 2.	
TRADE—Rules in restraint of trade—Illegality	230
See RESTRAINT OF TRADE.	
TRAIN—Obstruction of -	253, 278
See OBSTRUCTION OF TRAIN. 1, 2.	
TRANSPORTATION—Return from -	24
See PREVIOUS CONVICTION. 4.	
TREASURER—Friendly society—Clerk or servant -	177
See EMBEZZLEMENT. 4.	
TREES—Amount of Injury done—24 & 25 Vict. c. 96, s. 82.] The 24 & 25 Vict. c. 96, s. 82, enacts that whosoever shall steal, or cut, destroy or damage with intent to steal the whole or any part of any tree, &c., shall (in case the value of the article or articles stolen, or the amount of the injury done, shall exceed the sum of 5 <i>l.</i>), be guilty of felony:—Held, that in estimating the amount of the injury, the injury done to two or more trees may be added together, provided the trees are damaged at one and the same time, or so nearly at the same time as to form one continuous transaction. THE QUEEN v. SHEPHERD -	118
“UNDERTAKING FOR THE PAYMENT OF MONEY” -	341
See FORGERY. 5.	
UNCERTAINTY—Indictment—Surplusage	225
See DEPOSITION BEFORE JUSTICE.	
UNFINISHED HOUSE—Building—Arson -	338
See MALICIOUS INJURY. 1.	
UNLAWFUL WOUNDING—Practice—Indictment for “Unlawfully and maliciously wounding” and for “Unlawfully and maliciously inflicting grievous bodily Harm”—Verdict “Guilty of an Assault.”] An indictment charged the prisoner in the first count with “unlawfully and maliciously wounding,” and in the second count, with “unlawfully and maliciously inflicting grievous bodily harm.” The jury found the prisoner guilty of an assault:—Held, that the prisoner could be properly convicted of an assault on the indictment, as the offences charged were misdemeanours, and each of them necessarily included the lesser misdemeanour of an assault. THE QUEEN v. TAYLOR -	194
2. — Indictment <i>fc.</i> Felony — 24 & 25 Vict. c. 100, s. 18 — Conviction for Misdemeanour—14 & 15 Vict. c. 19, s. 5—Malice—Intent to frighten—Evidence.] The prosecutor and prisoner were out at night in separate punts, on a creek, in pursuit of wild fowl. The prisoner, who was jealous of any one going there to shoot, and had threatened to fire at birds notwithstanding other persons might be between him and them, discharged his gun from a distance of twenty-five yards towards the punt in which the prosecutor lay paddling. At that moment the prosecutor's punt slewed round, and the prosecutor was struck by some of the shot and seriously	

UNLAWFUL WOUNDING—continued.

wounded, whereupon the prisoner rendered him help, assuring him that the injury was an accidental result of the slewing round of the punt. The night was light and the boat visible fifty yards off. No birds were in view. The two men had always been on good terms, and the gun was fired apparently with the intention of frightening the prosecutor away rather than that of hurting him. The prisoner was indicted for the felony of wounding with intent to do grievous bodily harm; but the jury, under 14 & 15 Vict. c. 19, s. 5, found him guilty of the misdemeanour of unlawfully wounding:—*Held*, that "unlawful wounding" within the meaning of that section must be "malicious;" and that there was proof of malice, which justified the conviction of the prisoner. *THE QUEEN v. SAMUEL SMITH WARD* - 356

"UNLAWFULLY" - - - - 356

See UNLAWFUL WOUNDING. 2.

UNREGISTERED SHIP—Evidence—Jurisdiction—Ownership of Vessel—Registration—Merchant Shipping Act, 1854 (17 & 18 Vict. c. 104), s. 106.] On a trial for maliciously wounding on the high seas, it was stated by three witnesses that the vessel was a British ship of Shields, and that she was sailing under the British flag, but no proof was given of the register of the vessel or of the ownership:—*Held*, that the Court had jurisdiction over the offence; first, because the evidence was sufficient to prove that the vessel was a British vessel; secondly, because even if it had appeared that the vessel was not registered, the Court would still have jurisdiction, as there is nothing in the Merchant Shipping Acts to take away that jurisdiction, and also, by reason of s. 106 of the Merchant Shipping Act, 1854, which provides that, as regards the punishment of offences committed on board such a ship, she shall be dealt with in the same manner as if she were a recognized British ship. *THE QUEEN v. SEBERG* 264

URNAL—Exposing the person - - 282
See NUTRANCE.

VALUABLE SECURITY—Indictment for stealing must particularize the kind of - 61
See LARCENY. 12.

VENIRE DE NOVO—Mistrial—Jurisdiction 378
See VIEW.

VIEW—Mistrial—Evidence heard by Jury out of Court—Practice—Jurisdiction. It is no irregularity to allow the jury to have a view of premises after the judge has summed up the case. Where it is alleged that the jury have received evidence in the absence of the judge and of the prisoners, it is for the Court, before which the trial takes place, to investigate the facts, and ascertain whether the alleged irregularity has occurred. *Quare*, whether, if such irregularity be so found to have occurred, this Court has jurisdiction to

VIEW—continued.

order a venire de novo, as for a mistrial. *THE QUEEN v. HENRY MARTIN AND WILLIAM WEBB* 378

"WARRANT"—Forgery—Payment of money 257
See FORGERY. 4.

— of commitment—By whom to be executed 75
See ARREST. 2.

WIFE OF PRISONER—Witness—Competence 377
See COMPETENCE OF WITNESS. 2.

WITHDRAWAL OF EVIDENCE FROM JURY 33
See COMPETENCE OF WITNESS. 3.

WITNESS—Competence—Fellow-prisoner 349
See COMPETENCE OF WITNESS. 1.

— Competence—Wife of fellow-prisoner 377
See COMPETENCE OF WITNESS. 2.

— Competence—Withdrawal of evidence 33
See COMPETENCE OF WITNESS. 3.

— Cross-examination—Contradiction - 334
See CONTRADICTION OF WITNESS.

— Impeaching character - - - 70
See DISCREDITING WITNESS.

WORDS—"Acquittance or receipt for money" 217
See FORGERY. 1.

— "Authority" - - - - 257
See FORGERY. 4.

— "Building" - - - - 338
See MALICIOUS INJURY. 1.

— "County bridge" - - - - 237
See BRIDGE, REPAIR OF.

— "Deposition" - - - - 330
See FORGERY. 4.

— "Forge" - - - - 200
See FORGERY. 2.

— "Fraudulent purpose" - - - 347
See LARCENY. 11.

— "Hundred bridge" - - - - 237
See BRIDGE, REPAIR OF.

— "Lawful authority or excuse" - 284
See COINING.

— "Neglect" - - - - 99
See NEGLECT OF INFANT.

— "No present hope of recovery" - 187
See DYING DECLARATION.

— "Request" - - - - 257
See FORGERY. 4.

— "Substance of the offence charged" - 290
See PERJURY. 1.

— "Taking" - - - - 205
See LARCENY. 9.

— "Undertaking for the payment of money" 241
See FORGERY. 5.

— "Unlawfully" - - - - 356
See UNLAWFUL WOUNDING. 2.

— "Warrant" - - - - 257
See FORGERY. 4.

END OF VOL. I.

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